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No. ____

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

HERMAN WEINER,

Petitioner,

vs.

DOUBLEDAY & COMPANY, INC.

and

SHANA ALEXANDER,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS,
STATE OF NEW YORK**

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QUESTIONS PRESENTED

1. Whether the Court of Appeals misinterpreted and misapplied this Court's rulings on Public Concern and Public Interest, resulting in an erroneous according of First Amendment protection to defamatory per se statements accusing private figure petitioner of illegal and criminal behavior in his profession, thus violating his constitutional and common law rights.

2. Whether the Court of Appeals in its rulings on respondents' cross-motion for summary judgment disposing of petitioners action for defamation per se, and regarding itself as bound by First Amendment decisions by this Court, misinterpreted and misapplied its rulings by imposing a more onerous standard of proof, and a lower standard of investigative journalism, precluding a trial on genuine

issues of fact, thereby violating petitioner's constitutional and common law rights.

3. Whether the Court of Appeals in its rulings set forth above, effectively eliminated petitioner's common law right to recover for reputational injury in his profession, that of a licensed psychologist, abridging a liberty interest protected under the due process clause of the United States Constitution, thus depriving petitioner of a remedy for false defamatory accusations of illegal and criminal behavior.

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In The
Supreme Court of the United States
October Term, 1989

No.

HERMAN WEINER,

Petitioner,

v.

DOUBLEDAY & COMPANY INC.

AND

SHANA ALEXANDER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner Herman Weiner respectfully
prays that a writ of certiorari issue to
review the judgment of the Court of
Appeals of the State of New York entered
in this proceeding on December 14, 1989.

OPINIONS BELOW

The order and opinion of the Supreme Court: New York County granted petitioner's motion for summary judgment and denied respondents' cross-motion for summary judgment, the case to be placed on the trial calendar for the assessment of damages. The order and opinion are unreported. They appear in the appendix at A52-53. The decision and opinion of the Appellate Division: First Judicial Department, New York is reported at 142 A.D.2d 100. It appears in the appendix at A24-A26. It reverses the Supreme Court's order on the law and facts, dismisses petitioner's complaint and grants respondents' cross-motion for summary judgment. The opinion and order of the Court of Appeals of the State of New York is reported at 74 N.Y.2d 586, appears in A1-A20 affirming the order of the Appellate

Division awarding summary judgment to respondents on one ground only -- that petitioner had not raised a triable issue of the constitutionally invoked standard of gross negligence.

JURISDICTION

The judgment of the Court of Appeals was entered December 14, 1989. This petition for certiorari was filed within 90 days of that date. Jurisdiction is invoked under 28 U.S.C. par. 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment -- provides in part: Congress shall make no law ... abridging the freedom of speech, or of the press.

The Fourteenth Amendment -- provides in part: ... nor shall any state deprive any

person of life, liberty or property without due process of the law.

STATEMENT OF THE CASE

This petition arises out of a libel action by petitioner Herman Weiner, a licensed psychologist, against Doubleday & Co. Inc. and Shana Alexander, publisher and author of NUTCRACKER, a national best-selling non-fiction book published in 1985, chronicling the origins, history and vicissitudes of a tragically conflicted family beset by internecine rivalries for the largesse of Franklin Bradshaw, a millionaire businessman.

In 1985, Dr. Weiner commenced, in the Supreme Court, New York County, a libel action against Ms. Alexander and Doubleday, seeking compensatory and punitive damages, alleging emotional trauma, mental anguish and claiming that his per-

sonal and professional reputation had been maligned. Petitioner's motion for summary judgment was granted after oral argument upon the affidavit of petitioner asserting the falsity of the defamatory statements accusing him of sexual intimacy with his patient Frances in the 1960's and that the statements were published with gross negligence, malice and recklessness.

STATEMENTS OF THE CASE

A. THE LIBELOUS STATEMENTS IN THE DEMEANING PARAGRAPHS IN NUTCRACKER

In 1960, Dr. Herman Weiner, the petitioner, was a psychologist, certified pursuant to the Education Law of the State of New York, licensed under the same statute in 1973, and has continuously practiced his profession as a psychologist since 1960. His Ph.D. in clinical psychology

had been granted in 1959 by New York University.

In the early 1960's, Frances Gentile Schreuder was referred to him as a patient by her physician.

He saw Frances Schreuder as a patient for about three years. Somewhat later, she was divorced, had remarried in 1969 and had gone to Europe with her family. Thereafter, she consulted with him sporadically until 1972 when Dr. Weiner moved with his wife and family to Toronto, Canada, and established a practice there.

In the latter part of 1981, Dr. Weiner returned to New York City and reestablished his practice at 300 Mercer Street, New York, New York, where he still lives and works.

Dr. Weiner did not see, or hear from, Frances Schreuder from 1973 until 1982, when she called for an appointment. He learned that her son, Marc, had been con-

victed in 1982 of murdering his grandfather, Frances Schreuder's father, in 1978, and that Frances Schreuder had been indicted as complicitous in provoking that murder. She was convicted in 1983 and both mother and son are serving jail sentences at this time.

Over the course of this four hundred and forty-four page book, NUTCRACKER, Ms. Alexander describes the events leading to the murder, and the trials of mother and son, explores the family background, and the history of emotional disturbances in the late Mr. Bradshaw's family. According to the book, Mrs. Schreuder was a disturbed individual who alienated various members of the Bradshaw family, as a result of her life-style, which included alleged child neglect, promiscuous affairs, social climbing, attempted suicide, addiction to sedatives, and embezzlement of her father's money.

Before and after Dr. Weiner, many psychotherapists and psychiatrists had treated her. However, only Dr. Weiner is singled out in the following paragraphs (pp. 110-111 of the Book):

"In 1966 Frances put herself for two years under the car of a Park Avenue psychiatrist named Herman Weiner, who seems to have encouraged his patient to stand up to her over-protective mother. Berenice was attempting to infantilize her, Frances decided. She told Marc that Granny had a neurotic need for 'babies to smother,' which could account for Berenice's intense dislike of the man she began to habitually refer to as 'Weenie, the big, fat, ugly Jew.'"

Robert Reagan remembers Dr. Weiner arriving in court to testify for Frances, during the divorce proceedings, eccentrically costumed in bright red slacks and a loud plaid jacket. Marilyn Reagan remembers the size of one of his bills: Frances owed her psychiatrist \$3,000. 'My understanding was that her problem was inability facing reality,' says Marilyn. The huge unpaid bill made her sister think it might be the psychiatrist who had this problem, not his patient. Later, when Behrens claimed that 'Frances always slept with her shrinks,' the Reagans said they were not at all surprised.

They'd suspected 'hanky panky,' they confessed. Berenice has said the same." (emphasis added.)

Plaintiff's claim of libel per se and the holding of the Court of Appeals centers on the last three sentences of the second paragraph quoted above:

"Later, when Behrens claimed that 'Frances always slept with her shrinks,' the Reagans said they were not at all surprised. They'd suspected 'hanky-panky,' they confessed. Berenice has said the same."

The complaint alleges, in substance, that "the defamatory words attributed to Berenice (Frances' mother), Behrens (Frances' friend/confidante), the Reagans (her sister and brother-in-law -- (the latter, however, does not, according to Alexander's notes, participate in the libel, only Marilyn Reagan) were accepted by defendants as truth with respect to sexual relations between Dr. Weiner and

Frances, without any factual bases, without substantiation, without investigation, verification or validation, and without affording plaintiff, whose name, address and telephone number appeared in the Manhattan telephone and professional listings, a fair opportunity to respond to said accusations..."

Frances, who Alexander interviewed for one very long afternoon in a locked hotel room, was never asked about any such relationship with petitioner. The complaint sets forth (A93):

"23. By said statements defendants meant and intended to mean, and to have it so understood by the community as meaning that plaintiff, who was married, was committing adultery by having sexual intercourse with a patient, that he was violating the ethics of his profession in so doing, that he was guilty of malpractice in so doing, and that they could prove plaintiff guilty of such unethical, professionally improper and adulterous acts."

"24. The defamatory statements contained in said publication were published recklessly and maliciously and are wholly false; that said statements were calculated to and did hold plaintiff up to disgrace, ridicule and contempt, subject to professional disciplinary action under the laws of the State of New York, including possible loss of his licence to practice psychology, and that by reason of the publication thereof, plaintiff has been greatly damaged in his personal and professional reputation, to his damage in the sum of One Million (\$1,000,000.00) Dollars.

In his complaint, plaintiff further alleges that the sources relied upon by the defendants were known by the defendants to be unreliable sources as evidenced throughout the book in their hostilities, jealousies, prejudices, and, in Behrens' case, his criminal and perjurious activities, proclivities and declarations. The petitioners moving papers (A70) in the Court below amply demonstrate and exhibit the blatantly

unreliable source he was, as revealed in the book Nutcracker.

B. PROCEEDINGS IN THE SUPREME COURT NEW YORK

The Court determined that petitioner is a private figure, applied a standard of gross irresponsibility and after extensive oral argument and review of the supporting affidavits and evidence concluded that petitioner met his burden by a preponderance of the evidence, that the investigation conducted by respondents which led to the libelous statements was conducted in a "grossly irresponsible manner."

The Court cited evidence of distortion of respondents' literal notes of the reported gossip and the more certainty expressed in what was printed, in addition to respondents' purported belief in the truth of the libelous statements with no facts upon which to base this belief.

The Court decided that respondent Doubleday actively participated in the editorial process of the books, which included extensive review of any substantiation for the statements and therefore could not escape liability by showing that it relied upon the integrity of a reputable author, citing Chalpin v. Amordian Press, 128 A.D.2d 81, 515 N.Y.S.2d 434.

The Court then held that respondents had failed to lay bare any proof, or any evidentiary showing that there existed genuine, triable issues of fact which would preclude summary judgment for petitioner.

It is to be noted in this regard that respondents produced no affidavits from any sources of the repeated gossip, produced no evidence of investigation or substantiation for the false accusations and did not refute petitioner's affidavit setting forth the evidence of gross irrespon-

sibility with indicia of malice and his sworn statement of the falsity of the accusation.

Summary judgment on liability was granted petitioner, respondents' cross-motion was denied and the case was to be set down for trial on damages.

C. PROCEEDINGS IN THE APPELLATE DIVISION,
FIRST DEPARTMENT

This Court, on December 8, 1988, entered an order reversing the order of the Supreme Court, New York County on the law and on the facts, granted respondents' cross-motion for summary judgment and dismissed petitioner's complaint. The stated grounds were that the statements accusing petitioner of sexual intimacy with his patient, were pure, protected opinion, were responsibly researched and that petitioner had failed to raise a triable issue of fact that his reputation had been

injured or that the respondents had acted with malice or acted in a grossly irresponsible manner without consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties.

On February 23, 1989 this Court denied petitioner's motion for leave to appeal to the Court of Appeals.

D. PROCEEDINGS IN THE COURT OF APPEALS ON JUNE 30, 1989 THIS COURT GRANTED PETITIONER'S MOTION FOR LEAVE TO APPEAL TO THIS COURT.

On December 14, 1989 the Court entered an opinion and order affirming the Appellate Division's order awarding summary judgment to respondents on the sole ground that no triable issue had been raised as to respondents' gross irresponsibility.

In the course of this opinion it had concluded that the sentences

Later, when Behrens claimed that "Frances always slept with her shrinks," the Reagans said they were not at all surprised. They'd suspected "hanky-panky," they confessed. Berenice has said the same.

were reasonably susceptible of a defamatory meaning.

Petitioner agrees with this determination but believes it important to note that the reasoning, in arriving at this conclusion, obscures petitioner's claim that respondents, in making the statements as published, clearly more declaratory than the author's actual notes, participated in a deliberate distortion, one of the evidentiary observations made in the lower Court, as one indication of an ingredient of malice.

The other indication of malice, or reckless disregard for the truth or falsity of the defamatory statements, was in the lower Court's observation that respondents' affidavits on its cross-motion for

summary judgment espoused a belief in the truth of the allegations and as the lower Court said (A52):

the defendants claim to believe in the truth of the statements, however it is obvious to this Court that defendants have presented no facts upon which to base this belief, only unsupported allegations.

The Court of Appeals' decision states that "the challenged paragraphs accurately summarize the statements made to Alexander and her researcher" (A17).

At A18 the Court of Appeals' decision sums up its novel and unprecedented standard of responsible investigative journalism in this case, in the following words:

The independent views of the Reagans and Berenice Bradshaw tended to corroborate Behrens' statement. More importantly, the accuracy of the statement was further confirmed by the fact that a friend of both Schreuder and Behrens who was interviewed recalled that Behrens had earlier related the same information to her. In short, reasonable confirmation of the statement was obtained,

given the narrow circle of people whom it would have been productive to question.

One of the statements referred to was Behrens': Frances slept with all her shrinks.

However, Behrens was described in the book as an inveterate perjurer, an intermittent alcoholic, a man who swore to several versions of who was responsible for the murder of Frances' father; in his sexual preoccupations he told everybody the same stories about Frances (A140) and he claims to have forgotten whether or not he ever had sexual relations with her.

His hyperbolic statement was corroborated in the notes by Marilyn Reagan: It was just a wonder -- (A144-145) and by Berenice Bradshaw in the notes: She used to see this German Jew doctor in New York. Name was Herman Weiner. I hated him. I can't prove anything, but I've always felt

that man hypnotized her, and used her sexually. (A136)

But the Court, however, apparently ignored the notes and only examined the distorted version of these notes as published in the book in concluding that no triable issue was raised as to respondent's "gross irresponsibility."

REASONS FOR GRANTING THE WRIT

The extraordinary record of this case is illustrative of significant problems in a crucial area of American libel law, the question of according First Amendment protection to media when the defamation of a private figure is at issue, in speech which purports to be of Public Concern, Public Issue, Public Interest and matters "reasonably" related thereto.

Contrary to this Court's enunciating principles distinguishing between private

and public figures and its clarifying of methods for understanding the fact/opinion distinctions, no adequate systematic and meaningful criteria have been evolved by this Court to serve as guides to our Courts throughout the country in evaluating the concepts and parameters of Public Issue, Concern and Interest.

In the absence of such guidelines, the Courts in their earnest attempts to accord First Amendment protections to the media, including the Court of Appeals of New York, have, by misinterpreting and misunderstanding these concepts, gone far beyond even the broadest contours of such concepts. So far has this trend gone that significant deterioration of remedy for reputational injury has proceeded to its virtual elimination.

This is especially true, whereas in this case, a gross irresponsibility standard of culpability is invoked by the

Court of Appeals to give constitutional protection to the media upon the determination of the Court as a matter of law that Public Interest or Issue or Concern is implicated.

It is understandable if the suppression of such speech as is under consideration would have the chilling effect of self-censorship and suppress the "uninhibited, robust and wide open" debate of public issues from a free press but what has been chilled in this case is the good reputation and the untarnished professional life of the petitioner.

In answering petitioner's contention that a simple negligence standard should govern in evaluating his proof of fault because the false and defamatory accusation of sexual misconduct with his patient was an allegation of a crime of moral turpitude (adultery) and was a detour from legitimate public concern into the realm

of mere gossip and prurient interest. The Court, referring to Frances, said:

Her relationship with plaintiff is not so remote from that subject as to constitute a clear abuse of editorial discretion.

It is to be noted that the gratuitous, salacious, factually conclusive, but factually unsupported statement is a priori considered to be a description of Frances' relationship with the petitioner.

The Court continues:

This is precisely the sort of line-drawing that as we have made clear is best left to the judgment of journalists and editors which we will not second-guess absent clear abuse. (Gaeta v. New York News, 62 N.Y.S.2d 340-349, 477 N.Y.S.2d 82.)

This Court has never abandoned its concern for the reputational interests at stake of its private citizens. Nor has it doubted that society has a "pervasive and strong interest in preventing and redress-

ing attacks upon reputation." Rosenblatt v. Baer, 383 U.S. 75, 86 (1966). In Philadelphia Newspapers, Inc. v. Hepps, 106 S.Ct. 1558, 1562 (1986), the Court emphasized:

"The need to avoid self-censorship by the news media ... is not the only societal value at issue ... [or] this Court would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and indefensible immunity from liability for defamation." Gertz, 418 U.S. at 341.... See also Rosenblatt v. Baer, 383 U.S. 75, 92 ... (1966) (Stewart, J., concurring). Any analysis must also take into account the "legitimate state interest underlying the law of libel [in] the compensation of individuals for the harm inflicted on them by defamatory falsehood," Gertz, supra, 418 U.S. at 341....

The four dissenters in Hepps completely agreed with the statement. See 106 S.Ct. at 1566-67.

Recently, this Court has turned its attention to the area of Public Concern or Interest or Issue in an attempt to more

equitably maintain a good balance between the conflicting needs of a free society and particularly to a growing apprehension of the nefarious, rampant elaborations of constitutional protections, in the fragile preservation of one's private, good reputation. Dun & Bradstreet v. Greenmoss Builders Inc., 472 U.S. 749 (1985) is one such attempt to delineate these issues more carefully. Despite the fact that this is a non-media case with commercial speech, it has afforded the Court an opportunity to express its thoughts and rulings on "public concern" and indicating that the Gertz case should not be deemed to apply to speech not involving "matters of public concern." Point I will further pursue this issue.

The Court of Appeals decision, crafted to appear as a fact-dependent application of wholly uncontroversial legal standards, and thus not an appropri-

ate candidate for review by this Court, cannot hide the violations of petitioner's constitutional rights in its granting of summary judgment upon a finding that petitioner did not raise a triable issue on gross negligence.

The misinterpretation and misapprehension of the Public Concern or Public Interest, imposing a constitutional prerogative upon petitioners, together with a wholly inappropriate journalistic standard smacking of "neutral reporter" privilege, necessitating the elimination of findings of the Supreme Court bearing not only on gross irresponsibility but on indicia of malice, foreclosed the possibility of a trial, a deprivation of due process and the virtual elimination of a remedy for reputational injury. This will be further explicated in Part II.

This Court should grant certiorari to resolve the issues presented in the case

at bar in order to correct the erosion of private figure reputation due to the misinterpretation and misapplication of this Court's rulings in the area of Public Interest, Public Concern or Public Issue and the erroneously misconstruing of its rulings in Summary Judgment when the Constitutional standard above-referred to is implicated.

POINT ONE

THE COURT OF APPEALS, NEW YORK,
VIOLATED PETITIONER'S CONSTITUTIONAL AND COMMON LAW RIGHTS BY ITS MISINTERPRETATION AND MISAPPLICATION OF THIS COURT'S RULINGS ON FIRST AMENDMENT PROTECTION RELATING TO MATTERS OF PUBLIC INTEREST AND CONCERN.

When this Court focused its attention on the subject matter of a media publication, it stated as in Rosenbloom v. Metromedia Inc., 403 U.S. 29 that "... the determinant whether the First Amendment

applies to state libel actions is whether the utterance involved concerns an issue of public or general concern, albeit leaving the delineation of the record of that term to future cases." As had been predicted by three dissenters, the difficulty would be that since "all events arguably were 'within the area of public or general concern ... the rule could not have general applicability." Unfortunately, the states, in attempting to apply the rule, have gone far beyond the issues that have been the bases in determining what "legitimate" Public Interest and Concern or true "public speech" is. Shortly after this decision in 1971, federal and state courts applied this standard to such matters as quality of restaurant food, school suspensions, overseas backpacking, and private divorces. In a case arising out of a private divorce of some notoriety, Time v. Firestone, 424 U.S. 448, in con-

sidering "public controversy" as equivalent to "all controversies of interest to the public" stated:

Were we to accept this reasoning, we would reinstate the doctrine advanced in the plurality opinion in Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971), which concluded that the New York Times privilege should be extended to falsehoods defamatory of private persons whenever the statements concern matters of general or public interest. In Gertz, however, the Court repudiated this position, stating that "extension of the New York Times test proposed by the Rosenbloom plurality would abridge [a] legitimate state interest to a degree that we find unacceptable." 418 U.S., at 346.

In Gertz v. Robert Welch Inc., 418 U.S. 323 the Court attempted to respond to the concerns of private figures by holding that they need show only negligence to recover against the media, even if the matter involved an issue of public interest. However, considerations as to what constitutes public concern was largely ignored because of the strong

focus on applying the actual malice standard in almost all suits against the media.

What has transpired is that "matters of public interest" have become increasingly synonymous with "what the public is interested in."

The Court of appeals of New York has virtually abandoned its role in legitimate state interest of protecting private reputational injury. In Gaeta v. New York News (477 N.Y.S.2d 82) P85 (1984), speaking of a newspaper's articles and applying a standard of gross irresponsibility the Court stated:

"Determining what editorial content is of legitimate public interest and concern is a function for editors. While not conclusive, "a commercial enterprise's allocation of resources to specific matters and its editorial determination of what is newsworthy may be powerful evidence of the hold those subjects have on the public's attention."

The commercial establishment then, has determined that these statements are "reasonably related" to the story in the book which, according to the Court of Appeals, is "arguably a matter in the Public Interest." This appears to treat these statements as true, although the Court states mistakenly that they are unendorsed. See (A59) the affidavits in which respondents state their spurious belief in the truth of the defamatory statements.

Public interest is sure to be aroused by salacious tidbits, which is all this is. There is not a scintilla of "reasonably related" connection to the book's story, by way of this accusation. It is truly a gratuitous excursion of the utmost journalistic irresponsibility and reckless disregard for the truth.

The recent decision in Dun & Bradstreet v. Greenmoss Builders Inc.,

supra, decided that no distinction was to be made between media and non-media defendants and ruled that the Gertz case should not be deemed to apply to speech not involving "matters of public concern." In referring to a false credit report which was the subject of the libel, it stated that the credit report did not require special protection to ensure that "debate on public issue [will be] uninhibited, robust and wide open."

The same may be said to the media of its gratuitous diversion to petitioner of baseless gossip, cast in distorted form to become as printed, a false defamatory statement of fact alleging a crime of moral turpitude (adultery) by this private figure licensed psychologist.

POINT TWO

THE COURT OF APPEALS OF NEW YORK VIOLATED PETITIONER'S CONSTITUTIONAL AND COMMON LAW RIGHTS IN GRANTING RESPONDENTS CROSS-MOTION FOR SUMMARY JUDGMENT WHEN IN REGARDING ITSELF AS BOUND BY FIRST AMENDMENT RULINGS IT MIS-INTERPRETED AND MISAPPLIED THE DECISIONS SET FORTH BY THIS COURT.

In Gaeta, supra, decisive inquiry was made, into the evidence for the reliability and veracity of the source of the "information, and the possibility of 'animus.'"

This inquiry is totally absent in the opinion of the Court of Appeals.

In Gaeta, the court stated that the source was a worthy and reliable person who had "previously furnished accurate information to the Nursing Home Prosecutor." The reporter "had no reason to doubt the veracity of the information

received ... and ... indeed good reason to believe it was accurate (Gaeta, p.85).

The judgment of the Court in the present case proceeded on a totally different basis, ignoring the obvious animus expressed in the printed paragraphs themselves, but even more so in the original notes (A136).

This novel, unprecedented standard of review by the Court allowed for summary judgment to respondents on the basis that "the challenged statements were sufficiently confirmed for publication" (A14).

Continuing, the Court said:

"The independent views of the Reagans and Berenice Bradshaw tended to corroborate Behrens' statement.... A friend of Schreuder and Behrens ... recalled that Behrens had earlier related the same information to her. In short, reasonable confirmation of the statement was obtained, given the narrow circle of

people whom it would have been productive to question." (Emphasis ours) (A18)

This standard -- of several people claiming the same maligning gossip, all in a 'position to know the truth' trivializes the meaning of legitimate public speech entitled to the protection of the First Amendment. With this as the standard, the issue of gross irresponsibility and malice is completely bypassed. Petitioner is, at the minimum, entitled to a trial on ordinary negligence and malice.

In Anderson v. Liberty Lobby, 106 S.Ct. 2505, the majority's reasoning accorded well with that of Gaeta.

In the case at bar, a reading of the Court of Appeals' decision fails to cite any evidence presented to the Court on behalf of the petitioner. It is therefore clear why it could not employ its normal criteria of what a jury could conclude in

weighing the evidence presented by the litigants.

The statement that the petitioner raised no triable issue of fact as to gross irresponsibility is a conclusion which does not consider any of the evidence of gross negligence raised in petitioner's affidavit on his motion for summary judgment (A70) nor the findings of the Supreme Court as set forth in its opinion (A52-62).

These findings of the lower Court included evidence of malice as well.

The Appellate Division opinion (A26-51) is significantly flawed in the same manner, an absence of any consideration of the evidence of the total failure of the respondent to conduct any investigation or to offer any substantiation for the defamatory statements, and most importantly there is no evaluation of the reli-

ability of the sources as to veracity or freedom from bias or prejudice.

There is no consideration of the evidence of malice, a finding of the Supreme Court as indicated.

The Court of Appeals decision narrowed its focus to a consideration only of the accuracy of the statements and even there, the comparison with the author's notes, part of the record was apparently never made, nor was the evidence of this in petitioner's affidavit and in the lower Court's holding, ever acknowledged.

This sorry state of affairs may be due in part to an earlier period when normal rules of summary judgment in media cases were tilted favorably toward the media in First Amendment issues.

Granting certiorari in the case of St. Amant v. Thompson, 390 U.S. 725, which concerns a public official, the standard of culpability, was constitutional malice.

The Court stated in the course of its opinion:

The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.

In Harte-Hanks Communication v. Connaughton (49 CCH S.Ct. Bull) aff'g 842 F.2d 825 (6th Cir. 1988), a public figure case, the Supreme Court affirmed a judgment of compensatory and punitive damages, providing an extensive discussion of the

"actual malice" requirement imposed by New York Times v. Sullivan (376 U.S. 254 (1964)).

The Court in reviewing the actions of the newspaper in its investigatory and reporting process stated:

It is utterly bewildering in light of the fact that the Journal News committed substantial resources to investigating Thompson's claims, yet chose not to interview the one witness who was most likely to confirm Thompson's account of the events. However, if the Journal News had serious doubts concerning the truth of Thompson's remarks, but was committed to running the story, there was good reason not to interview Stephens -- while denials coming from Connaughton's supporters might be explained as motivated by a desire to assist Connaughton, a denial coming from Stephens would quickly put an end to the story. (P.B3832) (Underlining ours.)

Petitioner was known to be practicing in New York City since 1982.

As has been noted, the author Alexander not only had telephone access to Frances but, after the verdict of the

jury, Alexander reports (Nutcracker, p.10):

"Frances Schreuder invited me to her locked hotel room where we spent one very long afternoon together."

Apparently, the author sought no confirmation of any kind for this malicious gossip and speculation.

With the Court of Appeals' virtual abandonment of a significant judicial role in evaluating the constitutional entitlements of the media, the setting of a standard higher than negligence and the bending of the rules of ordinary summary judgment when Constitutional mandates are present in favor of an expeditious disposition of the case, the Court has acquiesced in the abuse of First Amendment applicability in derogation of petitioners' constitutional and common law rights to a remedy for reputational injury.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

LYMAN STANSKY
515 Madison Avenue
New York, NY 10021
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On the brief,
Murray Kagel.

APPENDIX



STATE OF NEW YORK
COURT OF APPEALS

1 No. 257

Herman Weiner,

Appellant,

v.

Doubleday & Company, Inc. et al.,

Respondents.

OPINION

Murray Kagel, Richard E. Mischel, Lyman Stansky, NY City, for appellant.

Victor A. Kovner, Laura R. Handman, Pamela M. Parker, Harriette K. Dorsen, Katherine Trager, NY City, for respondents.

Arthur Eisenberg, Kenneth P. Norwick, NY City, for NY Civil Liberties Union; Edward A. Miller, Slade R. Metcalf, NY City, for Association of American Publishers et al., amici curiae.

KAYE, J.:

The pivotal issue in this libel action, brought by a plaintiff who is not a public figure against the author and publisher of a nonfiction book, is whether defendants' investigation of allegedly defamatory statements was sufficient to shield them from liability, or whether they "acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties." (Chapadeau v Utica Observer-Dispatch, 38 NY2d 196, 199.)

Defendant Shana Alexander, a well-known journalist, wrote a book entitled "Nutcracker: Money, Madness Murder: A Family Album," published by co-defendant Doubleday & Company. "Nutcracker" is a nonfictional exploration of the Salt Lake City murder of Mormon multimillionaire Franklin Bradshaw, a murder which

Bradshaw's then 17-year-old grandson Marc Schreuder was convicted of committing. At a subsequent trial, based on Mark Schreuder's testimony, his mother--Franklin Bradshaw's daughter--Frances Bradshaw Schreuder, was convicted of planning the murder and dispatching Mark to carry it out.

Although "Nutcracker" attempts to reconstruct the murder and surrounding events, the book is more than a blow-by-blow account of the crime. Rather, it purports to be a searching inquiry into the Bradshaw family's history of emotional disturbance, with particular focus on family influences in the formation of Frances Schreuder's personality. Schreuder is portrayed as a person whose deep emotional disturbances were manifested in varied extreme forms, including child abuse, persistent lying and two stormy, broken marriages. The primary

sources of Alexander's psychological portrait are the other members of the extended Bradshaw family and Richard Behrens, Frances Schreuder's only friend and confidant during much of the period covered by the book.

The statements that give rise to this defamation action appear in a section of "Nutcracker" that is prefaced as follows: "Details of Frances's domestic existence must of necessity be reconstructed from the recollections of other members of her always carefully locked and guarded household: children, ex-husbands, ex-servants, Behrens and Berenice [Schreuder's mother]-her only visitors. Not the best of sources in any circumstances, especially these...." Several pages later appear the two paragraphs that contain the book's only reference to plaintiff:

In 1966 Frances put herself for two years under the care of a Park Avenue

psychiatrist named Herman Weiner, who seems to have encouraged his patient to stand up her overprotective mother. Berenice was attempting to infantilize her, Frances decided. She told Mark that Granny had a neurotic need for "babies to smother," which could account for Berenice's intense dislike of the man she began to habitually refer to as "Weenie, the big, fat, ugly Jew."

Robert Reagan remembers Dr. Weiner arriving in court to testify for Frances, during the divorce proceedings, eccentrically costumed in bright red slacks and a loud plaid jacket. Marilyn Reagan remembers the size of one of his bills: Frances owed her psychiatrist \$3,000. "My understanding was that her problem was inability facing reality," says Marilyn. The huge unpaid bill made her sister think it might be the psychiatrist who had this problem, not his patient. Later, when Behrens claimed that "Frances always slept with her shrinks," the Reagans said they were not at all surprised. They'd suspected "hanky panky," they confessed. Berenice has said the same.

Plaintiff contends that the sentence "Frances always slept with her shrinks," read in the context of the rest of the paragraph, defamed him, as it falsely

accused him of having sexual relations with his patient.*

In response, defendants contend that the challenged statement is simply not specific enough to be defamatory and, in any event, is a constitutionally protected expression of "opinion" as to which no claim of defamation will lie. Alternatively, defendants argue that the statement concerns a subject "reasonably related to matters warranting public exposition" (Chapadeau, 38 NY2d at 199, supra), and that plaintiff has failed to demonstrate--as he must to prevail on a claim of defamation with respect to such subject matter--that defendants acted without due consideration for responsible standards of information gathering and

*In his original complaint, plaintiff claimed that other portions of the two paragraphs were also defamatory, but he does not press those claims on this appeal.

dissemination (id.). Reversing the trial court, which had directed summary judgment for plaintiff on the issue of liability, the Appellate Division granted defendants' joint cross motion for summary judgment and dismissed the complaint, on the basis of all three somewhat inconsistent grounds asserted by defendants (142 AD2d 100). We now affirm, on the last ground alone.

[1] At the outset, we reject defendants' contention that under common law, the challenged statements are not susceptible of the defamatory meaning ascribed to them by plaintiff. Whether the contested statements are reasonably susceptible of a defamatory connotation is in the first instance a legal determination for the court. In analyzing the words in order to make that threshold decision, the court must not isolate them, but consider them in context, and give the language a natural reading rather than

strain to read it as mildly as possible at one extreme, or to find defamatory innuendo at the other (see, James v Gannett Co., 40 NY2d 415, 419-420).

Applying these principles, we conclude that in this case the sentence "Frances always slept with her shrinks" is reasonably susceptible of a defamatory meaning. In isolation, it might be more exaggeration or hyperbole, as defendants content; removed from its context in the book, the confirmation by Frances' relatives that they suspected "hanky panky" might be pure speculation. But viewing the quoted paragraphs as a whole, as we are obliged to do, the focus is not on Frances' promiscuity in general or on her relationship with psychiatrists in general, but on plaintiff alone and his relationship with Frances. Contrary to defendants' claim, it is not so unmistakably clear that the sole purpose of these paragraphs is to demonstrate

the hostility of Frances' family and Behrens toward the psychiatric profession that a more specific defamatory connotation may not also be understood.

We next turn to defendants' claim that under the First Amendment to the federal Constitution. It is settled that expressions of opinion, in contrast to assertions of fact, are privileged and, however offensive, may not be the subject of an action for defamation (Steinhilber v Alfonse, 68 NY2d 283). Defendants argue that this protection applies to the language singled out by plaintiff.

According to defendants, Alexander's method in assembling the "family album" was simply to recount the memories of those close to Schreuder, often in their own words, and to present sometimes conflicting points of view without necessarily attempting to reconcile them. Defendants characterize the book as "a

kaleidoscope of often certain impressions." This indeed is an accurate description of Alexander's technique; at several points she casts doubt on the accuracy and veracity of her informants. The resulting document, of a sort not entirely unfamiliar to readers of "true crime" accounts, is a hybrid genre. Largely a pastiche of statements by interviewees who are unendorsed and at times openly disparaged by Alexander herself, it eludes ready classification as "fact" or "opinion."

Defendants' efforts to fit the challenged statements into the protected "opinion" classification are predicated upon the peculiar genre of the work. In essence, defendants contend that because the statements merely summarize the contents of interviews with third persons, and because Alexander herself lends no authorial endorsement to the statements of

Behrens and the Bradshaw family (and in fact elsewhere suggests that the reader might be well advised to reserve a measure of skepticism for their judgments), the average reader would be disinclined to assume that "Frances always slept with her shrinks" was an accurate statement of fact. Therefore, the argument concludes, inasmuch as the universe of libel law is divided into "fact" and "opinion," the statements must be "opinion."

As literary criticism, defendants' claim may be unassailable. As a statement of law, it is problematic. We are not unmindful that the technique employed by Alexander is a popular one, and that presentation of the unedited statements and views of the subjects of a documentary work may be integral to the author's purpose, as Alexander states (see, e.g., Price v Viking Penguin, Inc., 881 F2d 1426, 1444-1445 [8th Cir]). That

Alexander's voice can be separated from the voice of her subjects does not, however, necessarily transform their otherwise factual assertions into her "opinion." Indeed, in Hogan v Herald Company, 58 NY2d 630, affg 84 AD2d 470, 476-470 [Simons, J.]), we rejected a claim that a "neutral reporting" privilege should be extended to a newspaper that published an objective report of newsworthy charges with proper attribution to sources. While the defendants in that case did not frame their contention in terms of "opinion," the protection sought differed little from that asserted by defendants here--a privilege to repeat the statements of third parties so long as no endorsement was given.

The "fact/opinion" distinction in the law of defamation is an evolving one. As courts are increasingly sensitive to the effect of protracted litigation on the

delicate balance between protection of a free press and protection of individual reputation, "opinion" has come to mean more than it does outside the libel law context (see, e.g., Immuno v Moor-Jankowski, 74 NY2d 548 [decided today]; Price v Viking Penguin, Inc., 881 F2d 1426, supra; Ollman v Evans, 750 F2d 970 [DC Cir], cert denied 471 US 1127).

We leave for another day, however, the question whether "opinion" protection should be enlarged to encompass the type of work that is the focus of the present controversy. Defendants have merely insisted that the challenged statements must be deemed opinion as a matter of settled law, and we conclude that this argument should be rejected. Important though it is to eschew rigidity in the area of First Amendment concerns, on this record of briefing and argument we have no basis for considering any alteration in

the sensitive policy balance that has been struck to date. Instead, we move to the third ground urged by defendants--the adequacy of their investigatory process--and on this ground we conclude that they must prevail.

[3,4,5] We agree that the Appellate Division that the challenged statements were sufficiently confirmed for publication. Preliminarily, we are satisfied that the standard to be applied in determining defendant's liability is that set forth in Chapadeau v Utica Observer-Dispatch (supra). In Chapadeau, we held that "where the content of the article is arguably within the sphere of legitimate public concern, which is reasonably related to matters warranting public exposition," the defamed party must establish "that the publisher acted in a grossly irresponsible manner without due consideration for the standards of infor-

mation gathering and dissemination ordinarily followed by responsible parties." (38 NY2d at 199, supra.)

We are unpersuaded by plaintiff's contention that a simple negligence standard should govern. Plaintiff does not dispute that the general subject of "Nutcracker" falls within the Chapadeau guidelines, but argues that the particular topic of his relationship with Frances Schreuder is a detour from legitimate public concern into the realm of mere gossip and prurient interest. This is precisely the sort of line-drawing that, as we have made clear, is best left to the judgment of journalists and editors, which we will not second-guess absent clear abuse (Gaeta v New York News, 62 NY2d 340, 349). "Nutcracker" is, in part, clearly intended as an inquiry into the failure of family and professional figures to halt the progression of Schreuder's illness before it

resulted in murder. Her relationship with plaintiff is not so remote from that subject as to constitute a clear abuse of editorial discretion.

Plaintiff has failed to come forward with evidence sufficient to raise a triable issue of fact as to whether defendants satisfied their duty of care under Chapadeau.

As to defendant Doubleday, as the Appellate Division noted, citing Geiger v Dell Publ. Co. (719 F2d 515 [1st Cir]), to require a publisher to do original research with respect to every potentially defamatory reference would impose undue financial burden (142 AD2d at 107). We have held that without "substantial reasons" to doubt the accuracy of the material or the trustworthiness of its author, a publisher is entitled to rely on the research of an established writer (Rinaldi v Holt, Rinehart & Winston, 42

NY2d 369, 382-383, cert denied 434 US 969; see also, Karaduman v Newsday, Inc., 51 NY2d 531, 551). Doubleday both relied on Alexander, whose experience and reputation are unquestioned, and conducted its own review of the contents of the book. The circumstances of this case did not require it to go further in order to meet its obligation under Chapadeau.

That burden was also met by defendant Alexander. She employed an experienced researcher, who several times interviewed Behrens. Alexander herself interviewed the Reagans and Berenice Bradshaw, the only other people likely to be at all familiar with Frances Schreuder's "carefully locked and guarded household." The challenged paragraphs accurately summarize the statements made to Alexander and her researcher. Plaintiff does not dispute that Behrens was Frances Schreuder's confidant during the period

she was in treatment with plaintiff, and knowledgeable about the details of Schreuder's personal life. This was additionally demonstrated by Behrens' testimony at Schreuder's trial, which revealed his intimate knowledge of her life.

The independent views of the Reagans and Berenice Bradshaw tended to corroborate Behrens' statements. More importantly, the accuracy of the statement was further confirmed by the fact that a friend of both Schreuder and Behrens who was interviewed recalled that Behrens had earlier related the same information to her. In short, reasonable confirmation of the statement was obtained, given the narrow circle of people whom it would have been productive to question.

Accordingly, no triable issue having been raised as to defendant's gross irresponsibility, the Appellate Division's

order awarding summary judgment to defendants should be affirmed, with costs.

* * * * *

Order affirmed, with costs. Opinion by Judge Kaye. Chief Judge Wachtler and Judges Simons, Alexander, Titone, Hancock and Bellacosa concur.

Decided December 14, 1989.

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court,
held at Court of Appeals Hall
in the City of Albany on the
thirty day of June A.D. 1989

Present, HON. SOL WACHTLER, Chief Judge,
presiding.

1-13 Mo. No. 502

Herman Weiner,

Appellant,

v.

Doubleday & Company, Inc.,
et al.,

Respondents.

A motion for leave to appeal to the
Court of Appeals in the above cause having
been heretofore made upon the part of the
appellant herein and papers having been
duly submitted thereon and due delibera-
tion thereupon had, it is

ORDERED, that the said motion be and
the same hereby is granted.

/S/
Donald M. Sheraw
Clerk of the Court

At a term of the Appellate
Division of the Supreme Court
held in and for the First
Judicial Department in the
County of New York, on
February 23, 1989

Present--Hon. Francis T. Murphy,
Presiding Justice

David Ross
Sidney H. Asch
Ernst H. Rosenberger
George Bundy Smith, Justices.

- - - - - x

Herman Weiner, :

Plaintiff-Respondent, :

-against- :

Doubleday & Company, Inc. and :
Shana Alexander, :

Defendants-Appellants. :
- - - - - x

M-74 [34715]

Plaintiff-respondent having moved for
leave to appeal to the Court of Appeals
from an order of this Court entered on
December 8, 1988.

Now, upon reading and filing the papers with respect to said motion, and due deliberation having been had thereon.

It is ordered that said motion be and the same hereby is denied, with \$100 costs.

ENTER:

FRANCIS X. GALDI

Clerk.

Present--Hon. Francis T. Murphy,
Presiding Justice
David Ross
Sidney H. Asch
Ernst H. Rosenberger
George Bundy Smith, Justices.

-----X

Herman Weiner, :

Plaintiff-Respondent, :

-against- :

Doubleday & Company, Inc. and :
Shana Alexander,

Defendants-Appellants.

-----X

An appeal having been taken to this Court by the defendants-appellants from an order of the Supreme Court, New York County (Louis Grossman, J.), entered on January 11, 1988, which granted plaintiff's motion for summary judgment on the issue of liability and directed a trial on the issue of damages,

And said appeal having been argued by Victor A. Kovner of counsel for appel-

lants, and by Lyman Stansky of counsel for respondent; and due deliberation having been had thereon, and upon the Opinion of this Court filed herein,

It is unanimously ordered that the order so appealed from be and the same hereby is reversed, on the law and on the facts, plaintiff's motion is denied, and defendants' joint cross-motion for summary judgment is granted, and, the complaint is dismissed, without costs and without disbursements. The clerk is directed to enter judgment in favor of defendants-appellants, dismissing plaintiff's complaint.

December 8, 1988

ENTER:

FRANCIS X. GALDI

DEPUTY CLERK.

ROSS, J.

We are presented, in this libel action, with the issue of whether unflattering references allegedly referring to the plaintiff, who is a practicing psychologist, which appear in a non-fiction book, are defamatory, or are constitutionally protected expressions of opinion.

Ms. Shana Alexander, in 1985, wrote a book, entitled: "Nutcracker: Money, Madness, Murder: A Family Album" (book), which was published in hardcover by Doubleday & Company, Inc. (Doubleday), a New York corporation, with its principal office located in New York County.

The book purports to be a non-fiction account of the widely publicized slaying of multi-millionaire Mr. Franklin Bradshaw (Mr. Bradshaw) in 1978, in Salt Lake City, Utah. Mr. Bradshaw was shot to death, by his then seventeen year-old grandson, Mr.

Marc Schreuder, who claimed in a confession, that he was following the orders of his then forty year-old mother, Ms. Frances Bradshaw Schreuder (Ms. Schreuder), who was the daughter of the victim. Both Mr. Marc Schreuder and Ms. Schreuder were convicted of that murder.

Over the course of this four hundred and forty-four page book, Ms. Alexander explores the history of emotional disturbance in the late Mr. Bradshaw's family, and, the author particularly deals with the influences that contributed to the development of the personality of Mr. Schreuder. According to the book, Ms. Schreuder was a disturbed individual, who, inter alia, alienated various members of the Bradshaw family, as a result of her lifestyle, which included alleged child neglect, promiscuous affairs, social climbing, attempted suicide, and, addiction to sedatives.

Discussed in the book are Ms. Schreuder's two stormy marriages, which both ended in divorce. First, in 1959, she married Mr. Vittorio Gentile, with whom she had two sons, one of whom was Mr. Marc Schreuder, and, then, after that marriage ended, Ms. Schreuder, in 1969, married Mr. Frederick Schreuder, with whom she had a daughter.

Our examination of the book indicates that, during the acrimonious divorce proceeding between Ms. Schreuder and Mr. Gentile in the mid-1960's, which, inter alia, involved the custody of their two sons, who were then pre-teenagers, several members of the Bradshaw family believed that Ms. Schreuder was an unfit mother. However, at that divorce trial, Dr. Herman Weiner (Dr. Weiner), a licensed psychologist, who was then treating Ms. Schreuder as a patient, testified as her witness, that she was a fit mother.

Although this book was published almost twenty years, after the divorce proceedings, mentioned supra, the mother of Ms. Schreuder, Mrs. Berenice Bradshaw (Mrs. Bradshaw), who was the widow of the slain man, as well as Ms. Schreuder's sister, Mrs. Marilyn Reagan (Mrs. Reagan), and, Mrs. Reagan's husband, Mr. Robert Reagan (Mr. Reagan), still expressed antagonism towards Dr. Weiner for his testimony on behalf of Ms. Schreuder.

The only references in the book to Dr. Weiner are contained in two paragraphs, which begin on page 110 and end on page 11. Those paragraphs read, as follows:

"In 1966 Frances put herself for two years under the care of a Park Avenue psychiatrist named Herman Weiner, who seems to have encouraged his patient to stand up to her overprotective mother. Berenice was attempting to infantilize her, Frances decided. She told Marc that Granny had a neurotic need for 'babies to smother,' which could account for Berenice's intense dislike of the man she began to habitually

refer to as 'Weenie, the big, fat, ugly Jew.'

Robert Reagan remembers Dr. Weiner arriving in court to testify for Frances, during the divorce proceedings, eccentrically costumed in bright red slacks and a loud plaid jacket. Marilyn Reagan remembers the size of one of his bills: Frances owed her psychiatrist \$3,000. 'My understanding was that her problem was inability facing reality, says Marilyn. The huge unpaid bill made her sister think it might be the psychiatrist who had this problem, not his patient. Later, when Behrens claimed that 'Frances always slept with her shrinks,' the Reagan said they were not at all surprised. They'd suspected 'hanky panky,' they confessed. Berenice has said the same."

Based upon those two paragraphs, in 1985, Dr. Weiner (plaintiff) commenced, in the Supreme Court, New York County, a libel action against Ms. Alexander and Doubleday (defendants), and, in that action he sought to recover damages in the amount of one million dollars, since he claimed his personal and professional reputation has been adversely affected. The complaint alleges, in substance, that

"the defamatory words attributed [in the two subject paragraphs, set forth supra] to Berenice, Behrens and the Reagans were accepted by defendants as factual, without investigation, verification or validation, without affording plaintiff, whose name, address and telephone number appeared in available telephone and professional listings, a fair opportunity to respond to said accusations ..." [material in brackets added].

When, in 1983, Ms. Alexander started to work on her book, she had almost forty years' experience as an investigative journalist and author. In the course of preparing to write this book, Ms. Alexander was assisted by Mr. Alex Dubro, who was a professional researcher and writer, who was recommended to her by the Center for Investigative Reporting in San Francisco, and, who, at the time of his participation in this book project, had

approximately fifteen years' experience as a journalist. Mr. Dubro, inter alia, had provided investigative services for the President's Commission on Organized Crime and the United States Senate Permanent Subcommittee on Investigations.

Following the joinder of issue, the plaintiff moved and the defendants jointly cross-moved for summary judgment. The IAS Court granted the plaintiff's motion, denied the defendants' cross-motion, set the matter down for an assessment of damages.

In an affidavit, dated November 3, 1987, which was submitted in support of defendants' joint cross-motion, Ms. Alexander stated: "Mr. Dubro and I spoke to approximately 250 different sources [in preparing the book]. All of the statements that plaintiff complains of in this action were based upon information that Mr. Dubro and I obtained during certain of

5

these personal interviews ...". Furthermore, in this affidavit, Ms. Alexander identified the person named "Behrens", who was quoted in the second paragraph of the material complained of by plaintiff, as "Richard Behrens [Mr. Behrens] ... a close friend of Frances Schreuder...".

After review of the two paragraphs in issue, we find there are two types of allegedly libelous statements contained in them about plaintiff, which were made by persons, who are named by the author, and, interviewed by Ms. Alexander and Mr. Dubro.

While the first type deals with belittling opinions of the plaintiff, such as that he was a "big, fat, ugly Jew", and that, when he testified in the divorce trial, plaintiff was "eccentrically costumed in bright red slacks and a loud plaid jacket", the second type deals with

expressions of opinion, which might injure plaintiff's personal and professional reputation, since they implied plaintiff overcharged his patients, and slept with them.

The Court of Appeals held in Aronson v. Wiersma, 65 NY 2d 592, 593-594 (1985), "[w]hether particular words are defamatory presents a legal question to be resolved by the court in the first instance (Tracy v. Newsday, Inc., 5 NY 2d 134; Sprecher v. Dow Jones & Co., 88 AD 2d 550, aff'd 58 NY 2d 862) ..." [material in brackets added].

We decided in Parks v. Steinbrenner, 131 AD 2d 60, 62 (1st Dept 1987), that statements of pure opinion "even if false and libelous, and no matter how pejorative or pernicious they may be, ... are safeguarded and may not serve as the basis for an action in defamation. (Steinhilber v. Alphonse, 68 NY 2d 283, 289; Rinaldi v.

Holt, Rinehart & Winston, 42 NY 2d 369, 380-381, cert. denied, 434 US 969.) ...".

In Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-340 (1974), the United States Supreme Court held: "However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas ...".

Chief Judge Wachtler wrote, in a recent opinion for the Court of Appeals, in Arcara v. Cloud Books, 68 NY 2d 553, 557-558 (1986), that:

" New York has a long history and tradition of fostering freedom of expression, often tolerating and supporting works which in other States would be found offensive to the community ... [citation omitted]. Thus, the minimal national standard established by the Supreme Court for First Amendment rights cannot be considered dispositive in determining the scope of this State's constitutional guarantee of freedom of expression ..." [material in brackets added].

Although we disapprove Mrs. Berenice Bradshaw's derogatory reference to plaintiff as a "big fat, ugly Jew", we find that it is a mere epithet, and, in this State there can be no action for libel based upon opinion, expressed in the form of epithets. For example, in Steinhilber v. Alphonse, 68 NY 2d 283, 287 (1986), it was held that the description of the plaintiff, who was employed by the New York Telephone Company, in Saugerties, New York, as "Louise the scab, years ago, she was an unknown failure. Now she is a known failure. She lacks only three things to get ahead, talent, ambition, and initiative ..." was not actionable; and, in Parks v. Steinbrenner, supra at 61, we held not actionable, as an expression of pure opinion, the assertion by an owner of a baseball team that the plaintiff, a professional Major League baseball umpire, was "not a capable umpire. He is a member

of one of the finest crews umpiring in the American League today, but obviously he doesn't measure up ...".

Furthermore, we find Mr. Reagan's unflattering comment that plaintiff, when he testified in the divorce/custody case, discussed supra, was "eccentrically costumed in bright red slacks and a loud plaid jacket", and, Mrs. Reagan's opinion that plaintiff overcharged his patients, to be expressions of pure opinion, and, therefore, not actionable (see, Steinhilber v. Alphonse, supra, and, Parks v. Steinbrenner, supra). We note in passing that plaintiff, himself, in his deposition, agreed that his \$3,000.00 bill was fairly sizable.

Turning now to the references in the subject second paragraph that implies plaintiff slept with Ms. Schreuder, our review of the record before us indicates

that, before placing them in the book, Ms. Alexander did substantial research.

Ms. Alexander's associate, Mr. Dubro, submitted an affidavit, dated November 9, 1987, in support of the defendants' joint cross-motion. In that affidavit, he stated: "[t]he statement that 'Frances [Schreuder] always slept with her shrinks' was volunteered by Mr. Behrens during one of my interviews. Because of his close personal relationship with Frances, I had no reason to doubt that he was privy to this information, nor to doubt the veracity of his recall ..." [material in brackets added].

Moreover, Ms. Alexander stated, in her own affidavit, mentioned supra, in pertinent part:

" Alec Dubro interviewed Mr. Behrens on three different occasions and considered him to be a reliable source ... Furthermore, when I wrote the book, I also had in hand the text of an interview I had conducted with Kathy

Livingstone, an editor at Town and Country magazine, who was a friend of both Behrens and Frances Schreuder. Ms. Livingstone said that Behrens had also told her that Frances 'always slept with her shrinks'. (Copies of my notes of this interview are annexed hereto as Exhibit 'C'.)...

As the book recounts, the Reagans told me in the course of a personal interview that they had 'suspected hanky-panky' between the plaintiff and Frances Schreuder. (See Exhibit 'B' hereto) In my interview with Berenice Bradshaw (Frances' mother), she independently told me of her belief that the plaintiff had a sexual relationship with Frances. (See Exhibit 'A' hereto). In light of these four separate reports, Mr. Dubro and I had no reason to doubt the accuracy of the statement as published ...".

It has been held that a reporter's misplaced reliance on sources does not in and of itself "demonstrate gross irresponsibility, even though the report given ... later ... [proves] to be inaccurate ..." (Robart v. Post-Standard, 74 AD 2d 963 (1980), aff'd 52 NY 2d 843 (1981); and see Gaeta v. New York News, 62 NY 2d 340, 351 (1984)).

Although, based upon our examination of the facts, we find that "plaintiff is a 'private' individual, the subject matter of the ... [book] in issue is unquestionably a matter 'within the sphere of legitimate public concern' ... [, since the book dealt with the emotional turmoil in the family of a well publicized murder victim] ..." (Karaduman v. Newsday, Inc., 51 NY 2d 531, 539 (1980)) [material in brackets added]. In order for a publisher such as defendant Doubleday to avoid liability in this defamatory action, it must not have "acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties ..." (Chapadeau v. Utica Observer, 38 NY 2d 196, 199 (1975)). The Court of Appeals decided in Rinaldi v. Holt, Rinehart, 42 NY 2d 369, 382-383 (1977), that a book publisher can rely

upon the reportorial skills of the author of a book, and, we find to persuasive evidence in this record, which indicates Doubleday "had, or should have had, substantial reasons to question the accuracy of the ... [material contained in the subject paragraphs] or the bona fides of its ... [author] ..." Rinaldi v. Holt, Rinehart, supra) [material in brackets added].

Furthermore, we find in the instant record convincing evidence that Doubleday carefully reviewed the book before its publication. Mr. James Moser, who was employed by Doubleday and who edited this book for them, stated, in an affidavit, dated November 6, 1987, which was submitted in support of the defendants' joint cross-motion, in pertinent part:

" Throughout the Book's preparation, I was in regular contact with the author, making editorial suggestions, as well as questioning her about statements

Doubleday believed might be problematic from a legal standpoint. I knew that the facts set forth in the Book were largely drawn from her personal interviews with family members and close friends of the Book's subject--Frances Schreuder

Any material that could possibly raise the issue of libel ... was reviewed by Doubleday's legal department. As it generally does when publishing non-fiction crime books of this kind, Doubleday also sent the manuscript to outside counsel, who are recognized as specialists in the law of libel. The outside law firm read the manuscript and suggested that the author supply the substantiation for certain statements appearing therein. After this internal and outside review, a member of Doubleday's legal department met with Alexander and was satisfied with the substantiation that she provided ...".

We cite, with approval, the following language from the United States Court of Appeals, First Circuit, in Geiger v. Dell Publishing Co., Inc., 719 F. 2d 515, 518 (1st Cir. 1983), "To require a book publisher to check, as a matter of course, every potentially defamatory reference might raise the price of non-fiction works

beyond the resources of the average man. This result would, we think, produce just such a chilling effect on the free flow of ideas as First Amendment jurisprudence has sought to avoid ...". In other words, based upon the careful review undertaken herein by Doubleday of the book's contents, we find there was no further obligation imposed by the psychologist-patient privilege (CPLR §4507), the defendants had no reason to anticipate plaintiff would discuss the details of his relationship with Ms. Schreuder with them.

We find that this book did not attempt to substantiate or refute everything that was said about Ms. Schreuder; but, rather it endeavored to expose the internecine rivalries and animosities that led to her downfall. In this light, the opinions expressed in the two offending paragraphs in our opinion were sufficiently confirmed

for publication (see Geiger v. Bell Publishing Co., Inc., supra).

When the subject two paragraphs are read in the context of this four hundred and forty-four page book, we find that the disparaging references to the plaintiff in those paragraphs are presented as pure opinions and not as facts. For example, the paragraphs appear in a section of the book, which is introduced by this warning statement from author, Ms. Alexander, that (see, page 105 of the book):

" Details of Frances's [Ms. Schreuder's] domestic existence must of necessity be reconstructed from the recollections of other members of her always carefully locked and guarded household: children, ex-husbands, ex-servants, Behrens, and Berenice-her only visitors. Not the best of sources in any circumstances ..." [material in brackets added, and emphasis supplied].

We find the purpose if this statement, quoted supra, is to caution the reader that the author is explicitly disclaiming

the factual nature of the perceptions about Ms. Schreuder expressed in those two paragraphs by family members and Mr. Behrens. Besides this warning, Ms. Alexander gives other similar warnings to the reader, such as: "if Behrens can be believed" (see, page 171 of the book); and, "Whom and what does one believe in this family?" (see, page 129 of the book). Cautionary passages like these, which are sprinkled throughout the book, in our view, indicate that the opinions of the family members and of Mr. Behrens were presented simply as nothing more than opinion, since "when the reasonable reader encounters cautionary language, he [or she] tends to 'discount that which follows' ..." (Ollman v. Evans, 750 F.2d 970, 983 (D.C. Cir. 1984) (en banc), cert. denied, 471 US 1127 (1985)) [material in brackets added].

The Court of Appeals in Steinhilber v. Alphonse, supra at 292 cites with approval the case of Ollman v. Evans, supra, for its discussion of four factors, which should be used "in differentiating between fact and opinion. The four factors are: (1) an assessment of whether the specific language in issue has a precise meaning which is readily understood or whether it is indefinite and ambiguous; (2) a determination of whether the statement is capable of being objectively characterized as true or false; (3) an examination of the full context of the communication in which the statement appears; and, (4) a consideration of the broader social context or setting surrounding the communication including the existence of any applicable customs or conventions which might 'signal to readers or listeners that what is being read or heard is likely to be opinion, not fact' (Ollman v. Evans,

supra, at 983; see, discussion of four factors, id., at pp 978-984) ...". Applying those four factors to the text in the book before us, we conclude that the commentary contained in the two subject paragraphs were unequivocally opinions and not facts. Expressions of opinion are absolutely protected by the First Amendment to the United States Constitution (see, Gertz v. Robert Welch, Inc., supra at 339).

In Janklow v. Newsweek, Inc., 788 F. 2d 1300, 1306 (8th Cir. 1986), cert. denied 479 US 883 (1986), the United States Court of Appeals, Eighth Circuit, warned that "Courts must be slow to intrude into the area of editorial judgment, not only with respect to choices of words, but also with respect to inclusions in or omissions from news stories. Accounts of past events are always selective, and under the First Amendment the decision of what to select

must always be left to writers and editors. It is not the business of government ...".

Although plaintiff claims that he has been damaged by the defendants' acts, he presents no evidence of that damage, except for his own affidavit. Further, plaintiff has not even submitted an affidavit from any objective third party indicating that he or she read the language in suit, and believed that plaintiff had sexual relations with Ms. Schreuder or any other patient, or thought less of plaintiff as a result. Significantly, plaintiff in his deposition limited his damages, when he stated "I'm not making a claim for loss of income from any practice due to the libel in the book ...".

In summary, we find that the material about the plaintiff set forth in the subject two paragraphs was responsibly researched by the defendants, and, are

expressions of opinion made by persons interviewed by Ms. Alexander and/or Mr. Dubro. As was stated by the United States Supreme Court in Gertz v. Robert Welch, Inc., supra at 340: "Our decisions recognize that a rule of strict liability that compels a publisher ... to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship. Allowing the media to avoid liability only by proving the truth of all injurious statements does not accord adequate protection to First Amendment liberties ...".

Based upon our analysis supra, we find that "[p]laintiff has not raised a triable issue as to whether defendants 'acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties' (Chapadeau v. Utica Observer Dispatch, 38 NY 2d 196, 199 ...) ..." (Gaeta v. New

York News, supra at 351). Furthermore, we find that the IAS Court erred when it granted plaintiff's motion for summary judgment, and, denied defendants' joint cross-motion for the same relief to dismiss the complaint. Finally, we find that, since plaintiff, based upon the record before us, has failed to raise a triable issue of fact that his reputation has been injured or that the defendants acted with malice, he "may not recover on a claim of defamation ..." (France v. St. Clare's Hosp., 82 AD 2d 1, 4 (1st Dept 1981), appeal withdrawn 56 NY 2d 593 (1982)). Therefore, "we see no reason to deprive the defendant of the ordinary remedy of summary judgment when an insufficient showing has been made in opposition to the motion. Indeed, we must not be reluctant to apply the ordinary rules governing summary judgment in libel cases

such as this ..." (Karaduman v. Newsday, Inc., supra at 545).

Accordingly, order, Supreme Court, New York County (Louis Grossman, J.), entered January 11, 1988, which, granted plaintiff's motion for summary judgment and denied defendants' joint cross-motion for summary judgment, is unanimously reversed, on the law and on the facts, plaintiff's motion is denied, and defendants' joint cross-motion for summary judgment is granted, and, the complaint is dismissed, without costs.

All concur

Order filed.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : I.A.S. PART 7

-----X

HERMAN WEINER,

Plaintiff,

-against-

DOUBLEDAY & COMPANY, INC. and
SHANA ALEXANDER,

Defendants.

-----X

Index No. 29527/85

LOUIS GROSSMAN, J.:

Plaintiff moves for summary judgment on the ground that there is no defense to the action, and setting the case down for assessment of damages by a jury. Defendants cross-move for summary judgment dismissing the complaint on the grounds that there are no genuine issues of material fact requiring a trial and defendants are entitled to judgment as a matter of law.

The above entitled action is for defamation.

The plaintiff is a licensed psychologist and has continually practiced his profession since 1960. In 1963, Ms. Frances Schreuder was referred to plaintiff by her doctor. Plaintiff continued to treat Ms. Schreuder "from time to time" until 1973. He did not see her again until 1982.

In June 1985, defendant, Shana Alexander, wrote a book "Nutcracker" which was published by Doubleday. "Nutcracker" is a non-fiction account of the widely publicized murder of multi-millionaire Franklin Bradshaw. Bradshaw's daughter, Frances Schreuder, and her son, Marc Schreuder, were tried and convicted of the crime of murdering Mr. Franklin Bradshaw. Ms. Alexander's book relates the family history of emotional problems which led to the said murder.

The following statements in the book alleged to be libelous appear on pp. 110-111:

In 1966, Frances put herself for two years under the car of a Park Avenue psychiatrist named Herman Weiner who seems to have encouraged his patient to stand up to her overprotective mother. Berenice was attempting to infantilize her, Frances decided. She told Marc that Granny had a neurotic need for "babies to smother," which could account for Berenice's intense dislike of the man she began to habitually refer to as "Weenie, the big, fat, ugly Jew."

Robert Reagan remembers Dr. Weiner arriving in court to testify for Frances, during the divorce proceedings, eccentrically costumed in bright red slacks and a loud plaid jacket. Marilyn Reagan remembers the size of one of her bills: Frances owed her psychiatrist \$3,000.00. "My understanding was that her problem was inability facing reality," says Marilyn. The huge unpaid bill made her sister think it might be the psychiatrist who had this problem, not his patient. Later, when Behrens claimed that "Frances always slept with her shrinks," the Reagans said they were not at all surprised. They'd suspected "hanky-panky," they confessed. Berenice has said the same. (emphasis added)

Plaintiff argues (1) plaintiff's verified denial of sexual intimacy with his patient cannot be contradicted; (2) the alleged libelous statement was a wholly gratuitous departure from the story line of the book and was not "reasonably related to matters warranting public exposition"; (3) "nutcracker" does not come within the protection of freedom of speech under the New York State Constitution for matters of public issue, public controversy, public concern or public interest; (4) the alleged sources for the alleged defamatory statements were known by the defendants to be "unreliable, hostile and prejudicial towards plaintiff and Frances Schreuder ..."; (5) the defendants' investigation was not responsibly conducted and constituted gross negligence and reckless disregard for the truth or falsity of the alleged libelous statements; (6) defendant Alexander demonstrated malice by

distorting her source's words; and (7) the plaintiff is a private figure under the law.

The plaintiff concludes by arguing that the statements accusing plaintiff of sexual intimacy with his patient constitute libel per se, since the said behavior constitutes professional malpractice, and a violation of professional ethics. In addition, the said accusation of adultery by the plaintiff constitutes a crime under New York Law and is also, therefore, libelous per se.

The defendants argue: (1) most of the statements complained of are constitutionally protected expressions of opinion; (2) plaintiff has admitted in testimony that certain factual statements complained of are true; and (3) "plaintiff cannot ... carry his burden of proving that any statement was published in a gross irresponsible way, much less with

knowledge of falsity or with reckless disregard for the truth."

A publication is libelous per se when the words are of such a character that an action may be brought upon them without the necessity of showing any special damage. The law presumes, in such a case, that one so slandered must have suffered damage.

An action in libel per se may be maintained when a publication is defamatory on its face. Tracy v. Newsday, Inc., 5 N.Y.S.2d 134 (1959). This Court is concerned with the statements referring to plaintiff's alleged sexual intimacy with his patient. It is clear to this Court that the statements referring to plaintiff's sexual intimacy with his patient, Frances Schreuder, provide sufficient basis for an action in libel per se. This statement would reasonably cause the reader to believe that plaintiff engaged

in morally and professionally unethical behavior. There is no doubt that the aforementioned statements have injured plaintiff's professional reputation and support a cause of action in libel per se. Since there is no liability for defamation without fault, the standard fault must be determined.

In Chapadeau v. Utica Observer-Dispatch Inc., 38 N.Y.2d 196, 199 (1975), the Court of Appeals, in discussing libelous statements about private individuals, held:

"Where the content of the article is arguably within the sphere of legitimate public concern ... the party defamed may recover; ... he must establish by a preponderance of the evidence, that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties."

After careful review of the supporting papers, and oral argument, this Court finds that the statement previously

discussed "that Frances always slept with her shrinks" was an outrageously irresponsible statement to make. The defendants claim to believe in the truth of the statements, however it is obvious to this Court that defendants have presented no facts upon which to base this belief, only unsupported allegations. In fact, there is evidence of distortion between Ms. Alexander's interviews with her sources and what was printed, e.g. a portion of an interview with Marilyn Reagan read as follows:

Marilyn Reagan: So I wondered if there wasn't a little hanky-panky going on.

Shana Alexander: Between the two of them, a romance, you mean?

Marilyn Reagan: Yeah. That was just a wonder on my part; and I made that statement before -- which I shouldn't have -- and since I made it before -- (emphasis added)

In the book (p. 111), "just a wonder" became "They'd suspected 'hanky-panky',

they confessed." In addition, Ms. Alexander adds "the Reagans said they were not at all surprised."

In an interview with Ms. Schreuder's mother, Berenice, Berenice is quoted as saying "I can't prove anything, but I've always felt that man hypnotized her, and used her sexually..." This translated to "Berenice has said the same".

Defendant, Doubleday, states that prior to publication there was extensive review of the substantiation for the statements contained in the book. Doubleday was satisfied then as to its accuracy and remains so".

It is clear to this Court that Doubleday actively participated in the editorial process of the book, which included extensive review of the substantiation for the statements. Therefore, Doubleday cannot escape liability by showing that it relied upon the integrity

of a reputable author. See, Chalpin v. Amordian Press, 128 A.D.2d 81.

"A party opposing a motion for summary judgment is bound to lay bare his proof and make an evidentiary showing that there exist genuine, triable issues of fact and he must do so with admissible evidence." Oates v. Marino, 106 A.D.2d 289, 291 (1st Dept. 1984). Defendants have failed to produce evidence that would lead this Court to conclude that there "exist genuine triable issues of fact" which would preclude summary judgment.

This Court concludes that plaintiff has met his burden, by a preponderance of the evidence, that the investigation conducted by defendants which led to the libelous statements was conducted in a "grossly irresponsible" manner.

Accordingly, plaintiff's motion for summary judgment is granted. Defendants' joint cross motion for summary judgment is

A-62

denied. Notice case for trial for damages
only.

Settle order.

DATED: December 2, 1987

L.G.

J.S.C.

At IAS Part 7 of the Supreme
Court of the State of New
York, held in and for the
County of New York, 60 Centre
Street, New York, New York on
the 22nd day of December,
1987

PRESENT: Honorable Louis Grossman
Justice

-----X

HERMAN WEINER,

Plaintiff,

-against-

DOUBLEDAY & COMPANY, INC. and
SHANA ALEXANDER,

Defendants.

-----X

ORDER

Index No. 29527/85

Plaintiff, Herman Weiner, having moved
this Court for an order: (1) granting
plaintiff summary judgment on the ground
that there is no defense to the action;
and (2) setting the case down for an
assessment of damages; and defendants

Doubleday & Company, Inc. ("Doubleday") and Shana Alexander having cross-moved this Court for an order, pursuant to CPLR 3212, dismissing the complaint on the grounds that: (1) virtually all statements complained of are expressions of opinion or mere epithets and, therefore, are absolutely protected under the First Amendment to the United States Constitution; (2) plaintiff has admitted that certain factual statements complained of are true; and (3) plaintiff cannot -- as a matter of law -- carry his burden of proving that any statement was published in a grossly irresponsible way, much less with knowledge of falsity or with reckless disregard for the truth;

NOW, upon the reading and filing of plaintiff's notice of motion dated October 28, 1987, together with the affidavit of Herman Weiner, sworn to October 2, 1987, and the sur-reply affidavit of Lyman

Stansky, sworn to December 3, 1987, read in support of the motion and upon notice of cross-motion of defendants Doubleday and Alexander, dated November 11, 1987, together with the affidavits of Shana Alexander, sworn to November 3, 1987, with exhibits annexed thereto, James Moser, sworn to November 6, 1987, Alex Dubro sworn to November 9, 1987, Robert M. Callagy, sworn to November 9, 1987, with exhibits annexed thereto, and the affidavit of Mark A. Fowler, sworn to November 30, 1987, with an exhibit annexed thereto, read in opposition to the motion and in support of the cross-motion and plaintiff having submitted for the motion and in opposition to the cross-motion by his attorney Lyman Stansky and defendants having submitted in opposition to the motion and for the cross-motion by their attorneys Satterlee Stephens Burke & Burke to this Court on the 19th day of November,

1987, and due deliberation having been had hereon and this Court having rendered a written decision, dated December 2, 1987, granting plaintiff's motion for summary judgment and denying defendants cross-motion for summary judgment;

NOW, upon the motion of Satterlee Stephens Burke & Burke, it is hereby

ORDERED that plaintiff's motion for summary judgment is hereby granted; and it is further

ORDERED that defendants' cross-motion for summary judgment is hereby denied; and it is further

ORDERED that upon filing of a Note of Issue and payment of the required filing fees that the case be placed on the trial calendar for the assessment of damages.

LOUIS GROSSMAN

J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
HERMAN WEINER,

Plaintiff,

-against-

DOUBLEDAY & COMPANY, INC. and
SHANA ALEXANDER,

Defendants.

-----X

NOTICE OF MOTION

SIRS:

PLEASE TO TAKE NOTICE that on the annexed affidavit of Herman Weiner, sworn to October 28, 1987, on the pleadings and on all the proceedings heretofore had herein, the plaintiff will move this Court before Mr. Justice Louis Grossman, at Individual Assignment Part 7, Room 540, at the County Court House, # 60 Centre Street, Borough of Manhattan, City of New

York, on November 19, 1987, at 9:30 o'clock in the forenoon;

1. for an order granting plaintiff Summary Judgment on the ground that there is no defense to the action;
2. setting the case down for assessment of damages by a jury; and
3. for such other further and different relief as may be just.

PLEASE TO TAKE FURTHER NOTICE that answering papers, if any, are required to be served within five days of the return day hereof.

Dated: New York, N. Y. October 28, 1987

Yours, etc.
Lyman Stansky
Attorney for Plaintiff
515 Madison Avenue
New York, NY 10022
Tel. (212) 753-9756

To: Satterlee & Stephens, Esqs.
Attorneys for Defendant
230 Park Avenue
New York, New York 10169
Tel. (212) 818-9200

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
HERMAN WEINER,

Plaintiff,

-against-

DOUBLEDAY & COMPANY, INC. and
SHANA ALEXANDER,

Defendants.
-----X

-----X
AFFIDAVIT IN SUPPORT OF MOTION

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS

HERMAN WEINER, being duly sworn,
deposes and says:

I am the plaintiff in this libel
action, and submit this affidavit in sup-
port of my application for Summary
Judgment in my favor and for an order set-
ting the case down for assessment of
damages.

In 1960 I was certified as a psychologist under the Education Law of the state of New York, was licensed under the same statute in 1973 and have continuously practiced my profession as a psychologist since 1960. My Ph.D. in clinical psychology had been granted in 1959 by New York University. In addition to private practice, group and individual, in New York City and in Toronto, Canada (where I was also licensed), I have been at various times on the faculty of New York University (1973-1977) of Albert Einstein College of Medicine (1968-1969), Cornell University Medical College (1961-1964), St. Barnabas Hospital (1975), Kings County Hospital (1956-1957) and Children's Village (1954-1956).

In 1963 one Frances Gentile was referred to me by her physician, as a patient who might profit from psychotherapy. She was

the daughter of Franklin Bradshaw, reputedly a millionaire operator of a business in Salt Lake City, Utah. His wife, her mother, was Berenice Bradshaw and there were two other daughters, Marilyn Reagan and Elaine Drukman.

Frances had two sons by her first marriage to one Vittorio Gentile, Marco and Lorenzo.

Frances continued to consult me professionally from time to time until sometime in 1973 when I removed my practice and my family to Toronto, Canada. I did not see her again until 1982.

THE FACTS

According to a book written by the defendant, Shana Alexander and published by the defendant Doubleday & Co., Inc. in 1985 entitled "NUTCRACKER" (hereinafter the Book), at sometime prior to 1978,

Frances and her sons had by forgeries and other methods, stolen about half a million dollars from her father and had established herself therewith in New York as a patron of ballet. She had become a member of the board of the ballet company managed by the late Balanchine after she had donated over \$300,000 to his organization and after her daughter by her second marriage to one Schreuder, had become a child member of the chorus of the ballet "Nutcracker". According to the book, after Frances knew that her father had been upset after discovering the money thefts, she became apprehensive that he would disinherit her. That concern triggered her plotting with one Richard Behrens to have her father killed before he changed his will and disinherited her.

In 1978, with the help of Behrens and under extreme pressure by his mother, Marc

Schreuder (formerly Marco Gentile) bought a gun in Texas, went to the warehouse of his grandfather, Franklin Bradshaw and shot him fatally. His death was attributed to an unsuccessful robbery attempt until Behrens informed Frances' sister, Marilyn Reagan, that the gun with which Franklin had been killed had been given to him by Marc (formerly Marco Gentile) who told him that he had killed his grandfather with that gun. According to the Book, Behrens had decided on this course because of Frances' refusal to repay him a \$3,000 loan he had made her some years before. He hoped to recoup that amount or more - there was a \$10,000 reward for the apprehension and conviction of Franklin's murderer - by the revelations he made to Marilyn. According to the Boo, there was no love lost between Frances on the one side, and her sister Marilyn and her husband Robert on the other hand, among

other reasons because of their jealousy of their mother Berenice's favoritism of Frances and the help that she had given Frances in stealing over \$500,000 from Franklin.

According to the Book, after Behrens had been given immunity for the crimes of possession of a handgun, and making false affidavits, he testified at the trials of Marc Schreuder and of Frances Schreuder. Grandson Marc was convicted of the murder on July 6, 1982 and daughter Frances on September 26, 1983. So far as I know they are serving prison sentences to this day.

As set forth above I left New York for Toronto, Canada with my wife and children in 1972. Although I returned to New York in 1981, I had had no contact with Frances during my entire stay in Toronto (1972 to 1981). I did not see her again until 1982.

THE LIBEL

According to the story based on these alleged facts, Frances had been under the psychiatric care of a number of psychologists, named and unnamed, prior to and during the various times when she consulted me. Some of them are mentioned by name, but only I have the distinction of being singled out for special description of physical appearance, bizarre dress, excessive charges for professional services, and as one of the "shrinks" having sexual relations with his patient in the following language; (referring to a period about twenty years before the publication of the book):

"In 1966 Frances put herself for two years under the care of a Park Avenue psychiatrist named Herman Weiner, who seems to have encouraged his patient to stand up to her overprotective mother. Berenice was attempting to infantilize her, Frances decided. She told Marc that Granny had a neurotic need for 'babies to smother' which

could account for Berenice's intense dislike of the man she began to habitually refer to as 'Weenie, the big, fat, ugly Jew.'

Robert Reagan remembers Dr. Weiner arriving in court to testify for Frances, during the divorce proceedings, eccentrically costumed in bright red slacks and a loud plaid jacket. Marilyn Reagan remembers the size of one of his bills: Frances owed her psychiatrist \$3,000. 'My understanding was that her problem was inability facing reality,' says Marilyn. The huge unpaid bill made her sister think it might be the psychiatrist who had this problem, not his patient. Later when Behrens claimed that 'Frances always slept with her shrinks,' the Reagans said they were not at all surprised. They'd suspected 'hanky-panky,' they confessed. Berenice has said the same."

I believe that hundreds of thousands of copies of the Book were printed and over one hundred thousand sold in New York state and elsewhere. In 1985 a second printing, I am informed, was published before this action had been started. With the active cooperation of the defendants, the facts of the Book were displayed by NBC on television on Sunday, March 22,

1987 and the following Monday and Tuesday. Although my name was not mentioned in the telecast, the Book itself, containing the libel, was thereby given further national publicity, presumably in the expectation that the sale of the Book containing the libel would be promoted.

It is respectfully submitted that the words libeling me were irrelevant to the story line of the Book, apparently dragged in gratuitously. The story was bizarre enough without singling me out as the therapist to be smeared.

The libel may have been the result of the author's bias against psychotherapists.

In reporting the sources of the words complained of, and without giving any facts on which the so-called sources relied, the defendants nevertheless

claimed reliance on gossip that they knew or should have know to be suspect.

An example of defendants' distortion and malicious approach is indicated by Exhibit 5 produced by defendant, Alexander, at her Examination before Trial on April 1, 1987, reading in relevant part:

M(arilyn) R(eagan): So I wondered if there wasn't a little hanky-panky going on.

S(hana) A(lexander): Between the two of them? A romance you mean?

M(arilyn) R(eagan): Yeah, that was just a wonder on my part and I made that statement before - which I shouldn't have - and since I'd made it before,
_____.

The Book's version of the above reads:

"Later, when Behrens claimed that "Frances always slept with her shrinks," the Reagans said they were not at all surprised. They'd suspected "hanky-panky," they confessed. Berenice had said the same." (p. 111)

The fact that defendants knew that the sources were unreliable are in the Book itself. Thus, the Book repeats and emphasizes that Berenice Bradshaw (p. 110) disliked me. In the Book, Behrens is described as unreliable, an alcoholic (pp. 92, 145), emotionally unstable, a man who did not remember whether he had ever had sexual intercourse with Frances (p. 95), a man who did not hesitate to make false affidavits and who had actively cooperated with Frances in helping Marc murder his grandfather (pp. 149, 171, 184, 186, 265, 266, 267, 269, 271, 272, 342, 343, 344, 345, 349, 402, 405, 409, 429).

"Berenice had said the same" (the words of the libel) was a distorted version of Alexander's notes of her interview with Berenice:

"BB (Berenice Bradshaw)" ... Course, Frances has always been very neurotic. She used to see this German Jew doctor

in New York. Name was Herman Weiner. I hated him. I can't prove anything but I have always felt that man hypnotized her and used her sexually Then he went to Canada. ... She started back with him. ... against my wishes - I hate him! Oh, I just hate him. I told that to my daughter Marilyn. She said 'good.'" (Exhibit 5, Alexander's Examination before Trial April 1, 1987).

On September 23, 1985 a letter was written on my behalf to Doubleday, reading in part:

"The inclusion of the unsubstantiated accusations and inferences about him in the book shows an utter disregard for his (plaintiff) professional reputation and portrays him in a false light to anyone who reads it.

On Dr. Weiner's behalf, I request that you contact the undersigned so that together we may explore how to undo any damage which may have been caused or may in the future be caused to his professional practice."

On October 17, 1985, compounding the wrong, Doubleday met this reasonable effort to avoid litigation, by a letter reading in part:

"At the time of publication Doubleday and its author, Ms. Alexander, believed in the truth of the statements contained in this book and had no reason to suspect any falsity. In the course of her research Ms. Alexander compiled enormous amounts of documents and conducted numerous documented personal interviews with the parties to the events described. It is from several different individuals who participated in these events that Ms. Alexander obtained the information of concern. Prior to publication there was extensive review of the substantiation for the statements contained in the book. Doubleday was satisfied then as to its accuracy and remains so."

Reliance by a publisher on the reputation for responsibility of the author is one thing, but when the publisher undertakes to examine and evaluate the author's production and characterizes gossip and innuendos as factual "information" and says it believes in the truth of these statements, then it places itself in pari delicto with its author by thus endorsing author's assassination of my character.

Describing me as "Weenie, the big, fat, ugly Jew," represents an effort to hold me up to ridicule. While being classified ethnically with Moses, Jesus, Solomon, Maimonides, Freud and Einstein may be the reverse of defamation, the context in which the Book used the word Jew as related to me, is surely intended to ridicule me, and to adversely affect my professional status. The fact that others of Frances' named psychotherapists were Jews, was not mentioned.

"Weenie, the big, fat, ugly Jew" was followed by a description of my appearing in court in Frances' child custody action in 1963 in "bright red slacks and a loud plaid jacket," of the alleged "huge unpaid bills" and Behrens' and the Reagan' claim, attributed to Berenice also that "Frances always slept with her shrinks."

I am informed that a writing is defamatory if it tends to expose a person to hatred, contempt or aversion or to induce an unsavory opinion of him in the minds of a substantial number of the community.

There is no truth to any of the statements. I never owned or wore "bright red slacks and a loud plaid jacket," never appeared in any court clad in such clothing. The "huge unpaid bill" was the accumulation of many therapeutic sessions, charged at normal rates when Frances was unable to pay, so the suggestion that excessive charges were made is untrue. I am informed that defendants' verified answer admits that the word "shrink" is popularly applied to psychiatrists and psychologists. Having sexual relations with psychotherapeutic patients is considered not professionally proper, but is possibly criminal and certainly a basis

for civil and criminal penalties such as deprivation of license to practice psychology.

Dell Publishing Co., which I am informed, is owned by defendant Doubleday, published a paperback in December 1985, when this action was already pending, in which the following libel was modified on advice of counsel (Doubleday, Examination before Trial (Supplement p. 56, line 6).

"In 1966 Frances put herself for two years under the care of a Park Avenue psychiatrist named Herman Weiner, who seems to have encouraged his patient to stand up to her overprotective mother. Berenice was attempting to infantilize her, Frances decided. She told Marc that Granny had a neurotic need for 'babies to smother', which could account for Berenice's intense dislike of the man. Robert Reagan remembers Dr. Weiner arriving in court to testify for Frances, during the divorce proceedings, and Marilyn Reagan remembers that at one point: Frances owed her psychiatrist \$3,000. 'My understanding was that her problem was inability facing reality,' says Marilyn. The huge unpaid bill made her sister think it might be the doc-

tor who had this problem, not his patient." (page 109).

Gone is the reference to "Weenie, the big, fat, ugly Jew." Gone the statements attributed to others, of plaintiff appearing "eccentrically costumed" in court. Omitted is the accusation of serious unprofessional conduct, sexual intercourse of a licensed psychologist with his patient a violation of professional ethics and grounds for that loss of license. Gone are some of the references to the sources of the defamatory statements contained in the hardcover edition that came out almost a year before the paperback.

I deny that I ever had any relations with Frances Schreuder other than that of therapist and patient. I deny that the unpaid bill, later paid by her mother Berenice without deduction and with an expression of thanks for my treating Frances when she was unable to pay, was

considered excessive by the individuals involved, nor was it, comprising as it did many therapeutic hours at normal rates. In my court appearance in 1963 involving custody of Frances' infant sons, I most certainly was not "eccentrically costumed."

The malicious intent of the defendant Alexander is clearly evident in that there is no basis in fact, nor any attempt to present facts to support the defamatory characterizations of me made by unfriendly, hostile individuals whose utterances of opinion, surmises and false statements are gratuitously dredged up 20 years later, and even then restated and distorted to malign me.

In completely failing to investigate for any factual bases for the unsubstantiated gossip and fantasy, defendants were grossly irresponsible. The libel was published with reckless disregard for my

professional reputation and feelings. Such conduct was entirely without consideration of the standards of information gathering and dissemination followed by responsible author and publishers.

This reprehensible conduct was confirmed by defendant Alexander in Exhibit 5 furnished by her on April 1, 1987 as part of her examination before trial:

"Other than the fact of Frances having been a patient of Dr. Weiner's over a period of years, and the remarks you report of Behrens, Marilyn Reagan, her husband and Berenice ... and possibly Larry and Marc, did you ascertain any facts to cause you to believe that Dr. Weiner had any sexual intimacies with Frances?

A. "No." (p. 85, lines 11 to 22)

Since there is no factual or legal defense to my action because no facts are given on which the defamatory statements are based and because the alleged sources are admittedly unreliable, according to

the Book itself, I am entitled to Summary Judgment.

Damages should be assessed by a jury. I do not claim specific monetary loss. I expect to prove on such assessment that publishers estimate that a copy is read by at least five, - and about 100,000 have been sold - resulting in many thousands of New Yorkers deciding against sending their troubled members to me for psychological counseling and therapy because I was held up to ridicule and professional disparagement as an eccentric, as an excessively expensive therapist and as one who had sexual relations with his patients. International distribution of the Book has had an emotional traumatic impact on me to this day.

I respectfully submit that I am entitled to have a jury under proper judicial instructions, pass on the unavoidable

loss of professional reputation and the emotional trauma that I have sustained as a result of this 1985 publication. In the very nature of the circumstances, such efforts may go on for years to come.

The assessing jury would then also take into consideration that, when an opportunity was presented to the defendants to help undo the wrong, the defendants aggravated their wanton and malicious defamation of my professional standing and personal integrity by insisting that the statements attributed to others were true. Thus, they not only failed to give their readers the facts, if any, on which the defamatory words are based, but when given the opportunity to negotiate a retraction, compounded the wrong by asserting their "truth."

Wherefore, I pray for judgment, for an order setting the case down for assessment

of damages by a jury, and for such other,
further and different relief as may be
just.

/S/
HERMAN WEINER

Sworn to before me
this 28th day of
October, 1987

HENRY B. TRATTNER
NOTARY PUBLIC, State of New York
No. TR-01-4689385
Qualified in Nassau County
Commission Expires Oct. 31, 1989

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X

HERMAN WEINER,

Plaintiff,

-against-

DOUBLEDAY & COMPANY, INC. and
SHANA ALEXANDER,

Defendants.

-----X

Index No.

Plaintiff designates New York County
as the place of trial.

The basis of the venue is plaintiff's
residence.

SUMMONS WITH NOTICE

Plaintiff resides at #300 Mercer Street,
New York, N.Y. 10003
County of New York.

To the above named Defendant(s)

YOU ARE HEREBY SUMMONED to answer the
complaint in this section and to serve a
copy of your answer, or, if the complaint
is not served with this summons, to serve

a notice of appearance, on the Plaintiff's Attorney(s) within 20 days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded herein.

Dated, New York, October 18, 1985

Defendants's Address:

#245 Park Avenue
New York, N.Y. 10017

LYMAN STANSKY
Attorney for Plaintiff
Office and Post Office Address
Madison Avenue
New York, N.Y. 10022
(212) 753-9755

#65

Notice: The object of this action is damages for libel

The relief sought is

Upon your failure to appear, judgment will be taken against you by default for the sum of \$1,000,000.00 and the costs of this action.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X

HERMAN WEINER,

Plaintiff,

-against-

DOUBLEDAY & COMPANY, INC. and
SHANA ALEXANDER,

Defendants.

-----X

VERIFIED COMPLAINT

Plaintiff, complaining of the defendants, by LYMAN STANSKY, his attorney, alleges that:

1. Plaintiff is a native born citizen of the United States, licensed under the Education Law of the State of New York, to practice psychology in the State of New York, with his home and office in New York City, has been practicing his profession

since 1960, and was of good name and repute as a psychologist.

2. On information and belief, the defendant Doubleday & Company, Inc. (Doubleday) is a domestic corporation, organized and existing under the laws of the State of New York, with its principal office at #245 Park Avenue, New York, N.Y.

3. In 1985 Doubleday published and distributed a book entitled "NUTCRACKER" written by defendant SHANA ALEXANDER.

4. Prior to the publication of said book, the defendants had contracted in the State of New York, to publish it.

5. On information and belief, over 500,000 copies of "NUTCRACKER" have been distributed and sold in the United States and elsewhere, most of them in and about New York City.

6. "NUTCRACKER" purports to be a factual report of the murder of FRANKLIN BRADSHAW, in 1978 by his grandson at the instigation of the grandson's mother, FRANCES SCHREUDER, a daughter of FRANKLIN BRADSHAW, and of the grandson's conviction for his murder on July 6, 1982, and of the daughter's conviction on September 26, 1983.

7. On information and belief, defendants have sold the right to publish a paperback edition of "NUTCRACKER" to DELL PUBLISHING CO. INC., are negotiating with a magazine known as LIFE for publication of a serialization thereof, and, with defendants' consent and cooperation, "NUTCRACKER" is in the process of being developed for television by NATIONAL BROADCASTING COMPANY-WARNER.

8. In "NUTCRACKER" defendants maliciously and recklessly published

concerning the plaintiff, the false and defamatory matter on pages 100 and 111 thereof, under the guise of reporting them as based on statements of others, as follows:

"In 1966 Frances put herself for two years under the care of a Park Avenue psychiatrist named Herman Weiner, who seems to have encouraged his patient to stand up to her overprotective mother. Berenice was attempting to infantilize her, Frances decided. She told Marc that Granny had a neurotic need for 'babies to smother' which could account for Berenice's intense dislike of the man, she began to habitually refer to as 'Weenie, the big, fat, ugly Jew.'

"Robert Reagan remembers Dr. Weiner arriving in court to testify for Frances, during the divorce proceedings, eccentrically costumed in bright red slacks and a loud plaid jacket. Marilyn Reagan remembers the size of one of his bills: Frances owed her psychiatrist \$3,000.00. 'My understanding was that her problem was inability facing reality,' says Marilyn. The huge unpaid bill made her sister think it might be the psychiatrist who had this problem, not his patient. Later, when Behrens claimed that 'Frances always slept with her shrinks,' the Reagan said they were not at all surprised. They'd suspected 'hanky-panky,' they

confessed. Berenice has said the same."

9. The word "shrink" is a popular description of psychiatrists and of psychologists such as plaintiff, who utilize the technique known as "psychoanalysis" for therapeutic purposes.

10. Marilyn Reagan was a sister of the patient, Frances Schreuder, Robert Reagan her husband, Berenice her mother, referred to as Granny, and Marc, Frances' son and Berenice's grandson.

11. Investigation prior to publication would have established as fact that the year was 1961, at 255 West 88th Street, New York City, and from 1966 to 1973, only at an office on Park Avenue, and that plaintiff had made no claim to having been licensed as a psychiatrist in the State of New York or elsewhere.

12. The false statements concerning plaintiff set forth in ¶8. hereof, were published to lend credence to the statements attributed to others, and intended by the defendants to be accepted by the community as factual.

13. The statements attributed by defendants to Behrens, as set forth in ¶8. hereof, and claimed to have been approved and repeated by the Reagans and Berenice, that "Frances" always slept with her shrinks" were published to establish as a fact that the plaintiff had sexual relations with his patient Frances, while she was under his therapeutic care.

14. The conduct described in ¶13. hereof attributed to plaintiff constituted professional malpractice.

15. In publishing said statements, defendants relied on statements alleged to

have been made by Richard Behrens, by Berenice, by Marilyn Reagan and by her husband Robert Reagan.

16. In "NUTCRACKER" defendants state with respect to BEHRENS, that he did not remember whether he had had sexual relations with Frances, that he was an "intermittent" alcoholic, a persistent liar, a perjurer, and that he had been arrested and jailed in New York City for the criminal possession of a weapon, obstruction of justice and tampering with evidence.

17. Behrens' arrest and jailing was based on his having had possession of the gun with which Marc had killed his grandfather at the instigation of Frances, his grandfather's daughter, and the accusation that he had kept the gun at his New York residence, in violation of the New York

statutes that made the possession thereof a crime in New York.

18. In "NUTCRACKER" Marilyn Reagan, Frances' sister, is described as jealous of their mother's regard and affection for Frances, and as fearful that the mother, Berenice, would disinherit Marilyn in favor of Frances.

19. In holding plaintiff up to contempt and ridicule, and impugning his professional repute and his character, defendants relied on the unsubstantiated gossip emanating from Behrens, Berenice, and Marilyn and Robert Reagan, who they knew, or should have known, were prejudiced against plaintiff.

20. The defamatory words attributed to Berenice, Behrens and the Reagans were accepted by defendants as factual, without investigation, verification or validation,

without affording plaintiff, whose name, address and telephone number appeared in available telephone and professional listings, a fair opportunity to respond to said accusations.

21. Of the several other psychotherapists to whom Frances had gone for psychotherapy, referred to as "shrinks" in ¶8. hereof, only plaintiff is identified as a "shrink" by name and held up to ridicule and contempt.

22. Said identification and holding plaintiff up to ridicule and contempt were malicious.

23. By said statements defendants meant and intended to mean, and to have it so understood by the community as meaning that plaintiff, who was married, was committing adultery by having sexual intercourse with a patient, that he was

violating the ethics of his profession in so doing, that he was guilty of malpractice in so doing, and that they could prove plaintiff guilty of such unethical, professionally improper and adulterous acts.

24. The defamatory statements contained in said publication were published recklessly and maliciously and are wholly false; that said statements were calculated to and did hold plaintiff up to disgrace, ridicule and contempt, subject to professional disciplinary action under the laws of the State of New York, including possible loss of his license to practice psychology, and that by reason of the publication thereof, plaintiff has been greatly damaged in his personal and professional reputation, to his damage in the sum of One Million (\$1,000,000.00) Dollars.

WHEREFORE, plaintiff demands judgment against the defendants in the sum of One Million (\$1,000,000.00) Dollars, together with the costs and disbursements of this action.

LYMAN STANSKY
Attorney for Plaintiff
#515 Madison Avenue
New York, N.Y. 10022
(212) 753-9755

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X

HERMAN WEINER,

Plaintiff,

-against-

DOUBLEDAY & COMPANY, INC. and
SHANA ALEXANDER,

Defendants.

-----X

Index No.

VERIFIED ANSWER

Defendant, Doubleday & Company, Inc.
("Doubleday"), by its attorneys Satterlee
& Stephens, for its Verified Answer to the
Complaint respectfully alleges:

FIRST: Denies knowledge and informa-
tion sufficient to form a belief as to the
truth of each and every allegation con-
tained in paragraph 1 of the Complaint.

SECOND: Denies each and every allegation contained in paragraph 2 of the Complaint except admits that defendant Doubleday is a New York corporation with an executive office at 245 Park Avenue, New York, New York.

THIRD: With respect to paragraphs 3, 4 and 5 of the Complaint, admits that Shana Alexander (hereinafter "Alexander") is the author of "Nutcracker" (hereinafter the "book") which was published by Doubleday pursuant to a contract entered into between Doubleday and Alexander in New York and otherwise denies each and every allegation contained in said paragraphs of the Complaint.

FOURTH: Denies each and every allegation contained in paragraphs 6 of the Complaint except admits that the book is based on the story of the murder of Franklin Bradshaw and begs leave to refer to a true copy of the book for an accurate

statement of what is contained therein, in its proper context.

FIFTH: Denies knowledge and information sufficient to form a belief as to the truth of each and every allegation contained in paragraph 7 of the Complaint except admits that Dell Publishing Co., Inc. has obtained the right to publish a paperback edition of the book.

SIXTH: Denies each and every allegation contained in paragraph 8 of the Complaint and begs leave to refer to a true copy of pages 110 and 111 of the book for an accurate statement of what is contained therein, in its proper context.

SEVENTH: Denies each and every allegation contained in paragraph 9 of the Complaint except admits that the word "shrink" is occasionally used by the public to refer to physicians who specialize in the practice of psychiatry and also to psychologists.

EIGHTH: Admits that Marilyn Reagan, Frances Schreuder, Robert Reagan, Berenice and Marc appear in the book and otherwise denies knowledge and information sufficient to form a belief as to the truth of each and every allegation contained in paragraphs 10 and 11 of the Complaint.

NINTH: Denies each and every allegation contained in paragraphs 12, 13, 14 and 15, inclusive, of the Complaint.

TENTH: Denies each and every allegation contained in paragraphs 16, 17 and 18, inclusive, of the Complaint and begs leave to refer to a true copy of the book for what is contained therein, in its proper context.

ELEVENTH: Denies each and every allegation contained in paragraphs 19, 20, 21, 22, 23 and 24, inclusive, of the Complaint.

As and For a First Affirmative Defense

TWELFTH: Plaintiff fails to state a claim upon which relief can be granted.

As and For a Second Affirmative Defense

THIRTEENTH: Most of the statements complained of are a matter of public record. As to such statements, defendant is entitled to the neutral reportage privilege. Such statements were made in good faith and under the reasonable belief that they accurately conveyed the information available to the public.

As and For a Third Affirmative Defense

FOURTEENTH: Plaintiff, by reason of his activities and involvement in the events reported in the book, at or about the time of publication was a public figure as that term is defined under New York Times v. Sullivan and its progeny.

As and For a Fourth Affirmative Defense

FIFTEENTH: At the time of publication Doubleday believed that all statements of

fact contained in the book were true. In publishing the book, Doubleday conducted itself according to the usual practices then and now prevailing in the business of publishing trade books.

As and For a Fifth Affirmative Defense

SIXTEENTH: The subject of the book was and still is a matter of public interest. The statements complained of relate to plaintiff's activities and conduct in connection with the events described in the book and are privileged and protected under the United States Constitution, the New York State Constitution and the law of the State of New York.

As and For a Sixth Affirmative Defense

SEVENTEENTH: The publication of any statements in the book alleged to be libelous of plaintiff was without fault on the part of Doubleday. Doubleday was not negligent or grossly negligent with respect to such publication and relied

upon its author, an independent contractor and experienced professional, who obtained information from reliable sources who represented to Doubleday that the book was free of libel and invasion of privacy.

As and For a Seventh Affirmative Defense

EIGHTEENTH: The statements made in the book which are complained of by plaintiff, insofar as the same consist of expressions of opinion and are of and concerning plaintiff, are fair comment, published in good faith, without actual malice or gross negligence, upon facts which are matters of public interest and concern and by reason thereof, the same are privileged.

WHEREFORE, Defendant Doubleday demands judgment dismissing the Complaint, together with costs and disbursements of this action and reasonable attorney's fees.

A-113

SATTERLEE & STEPHENS
Attorneys for Plaintiff
277 Park Avenue
New York, New York 10172
(212) 826-6200

VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Gerald H. Toner, being duly sworn, says that he is the Vice President, General Counsel and Secretary of Doubleday & Company, Inc. the corporation in this section.

That he has read the foregoing Answer and knows the contents thereof; that it is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief and as to those matters he believes them to be true.

/S/
Gerald H. Toner

Sworn to before me this
22nd day of November, 1985

BEVERLY CANO
NOTARY PUBLIC, State of New York
No. 41-4__1584
Qualified in Queens County
Certificate filed in New York County
Commission Expires March 30, 1987

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X

HERMAN WEINER,

Plaintiff,

-against-

DOUBLEDAY & COMPANY, INC. and
SHANA ALEXANDER,

Defendants.

-----X

Index No.

VERIFIED ANSWER

Defendant, Shana Alexander
("Alexander"), by her attorneys Satterlee
& Stephens, for her Verified Answer to the
Complaint respectfully alleges:

FIRST: Denies knowledge and informa-
tion sufficient to form a belief as to the
truth of each and every allegation con-
tained in paragraphs 1 and 2 of the
Complaint.

SECOND: With respect to paragraphs 3, 4 and 5 of the Complaint, admits that Alexander is the author of "Nutcracker" (hereinafter the "book") which was published by Doubleday pursuant to a contract entered into between Doubleday and Alexander in New York and otherwise denies knowledge and information sufficient to form a belief as to the truth of each and every allegation contained in said paragraphs of the Complaint.

THIRD: Denies each and every allegation contained in paragraph 6 of the Complaint except admits that the book is based on the story of the murder of Franklin Bradshaw and begs leave to refer to a true copy of the book for an accurate statement of what is contained therein, in its proper context.

FOURTH: Denies knowledge and information sufficient to form a belief as to the truth of each and every allegation

contained in paragraph 7 of the Complaint except admits that Alexander is negotiating with Life Magazine and National Broadcasting Company with respect to the first serial and television rights in the book.

FIFTH: Denies each and every allegation contained in paragraph 8 of the Complaint and begs leave to refer to a true copy of pages 110 and 111 of the book for an accurate statement of what is contained therein, in its proper context.

SIXTH: Denies each and every allegation contained in paragraph 9 of the Complaint except admits that the word "shrink" is occasionally used by the public to refer to physicians who specialize in the practice of psychiatry and also to psychologists.

SEVENTH: With respect to paragraph 10, admits that Marilyn Reagan, Frances Schreuder, Robert Reagan, Berenice and

Marc appear in the book and begs leave to refer to a true copy of the book for an accurate statement of what is contained therein, in its proper context.

EIGHTH: Denies knowledge and information sufficient to form a belief as to the truth of each and every allegation contained in paragraph 11 of the Complaint.

NINTH: Denies each and every allegation contained in paragraphs 12, 13, 14 and 15, inclusive, of the Complaint.

TENTH: Denies each and every allegation contained in paragraphs 16, 17 and 18, inclusive, of the Complaint and begs leave to refer to a true copy of the book for what is contained therein, in its proper context.

ELEVENTH: Denies each and every allegation contained in paragraphs 19, 20, 21, 22, 23 and 24, inclusive, of the Complaint.

As and For a First Affirmative Defense

TWELFTH: Plaintiff fails to state a claim upon which relief can be granted.

As and For a Second Affirmative Defense

THIRTEENTH: Most of the statements complained of are a matter of public record. As to such statements, defendant Alexander is entitled to the neutral reportage privilege. Such statements were made in good faith and under the reasonable belief that they accurately conveyed the information available to the public.

As and For a Third Affirmative Defense

FOURTEENTH: Plaintiff, by reason of his activities and involvement in the events reported in the book at or about the time of publication was a public figure as that term is defined under New York Times v. Sullivan and its progeny.

As and For a Fourth Affirmative Defense

FIFTEENTH: At the time of publication Alexander believed that all statements of

fact contained in the book were true. In publishing the book, Alexander conducted herself according to the usual reporting and journalistic practices then and now prevailing.

As and For a First Affirmative Defense

SIXTEENTH: The subject of the book was and still is a matter of public interest. The statements complained of relate to plaintiff's activities and conduct in connection with the events described in the book and are privileged and protected under the United States Constitution, the New York State Constitution and the law of the State of New York.

As and For a Sixth Affirmative Defense

SEVENTEENTH: The publication of any statements in the book alleged to be libelous of plaintiff was without fault on the part of Alexander. Alexander was not negligent or grossly negligent with respect to such publication and obtained

and verified information from reliable sources.

As and For a Seventh Affirmative Defense

EIGHTEENTH: The statements made in the book which are complained of by plaintiff, insofar as the same consist of expressions of opinion and are of and concerning plaintiff, are fair comment, published in good faith, without actual malice or gross negligence, upon facts which are matters of public interest and concern and by reason thereof, the same are privileged.

WHEREFORE, Defendant Alexander demands judgment dismissing the Complaint, together with costs and disbursements of this action and reasonable attorney's fees.

SATTERLEE & STEPHENS
Attorneys for Defendants
277 Park Avenue
New York, New York 10172
(212) 826-6200

VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

SHANA ALEXANDER, being duly sworn, says
that she is a defendant in this action.

That she has read the foregoing
Verified Answer and knows the contents
thereof; that it is true of her own knowl-
edge, except as to the matters therein
stated to be alleged on information and
belief and as to those matters she
believes it to be true.

/S/
SHANA ALEXANDER

Sworn to before me this
5th day of December, 1985

CARL THOMAS BOONE
State of New York
#24-0180-4793094
Qualified in Kings County
Commission Expires March 30, 1987

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X

HERMAN WEINER,

Plaintiff,

-against-

DOUBLEDAY & COMPANY, INC. and
SHANA ALEXANDER,

Defendants.

-----X

Index No. 29527/85
Assigned to the
Honorable Louis Grossman

NOTICE OF CROSS-MOTION
FOR SUMMARY JUDGMENT

S I R:

PLEASE TAKE NOTICE, that upon the annexed affidavits of Shana Alexander, sworn to November 3, 1987, James Moser, sworn to November 6, 1987, Alec Dubro, sworn to November 9, 1987, and Robert M. Callagy, sworn to November 9, 1987, with exhibits annexed thereto, and upon the

complaint and answers in this action, and upon all prior proceedings heretofore had herein, the undersigned will cross-move this Court on November 19, 1987, before the Honorable Louis Grossman, IAS Part 7, Room 540, at the Courthouse located at 60 Centre Street, New York, New York, at 9:30 A.M., in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order granting summary judgment to the defendants, pursuant to CPLR 3212, dismissing the complaint on the grounds that:

- (1) virtually all of the statements complained of are expressions of opinion or mere epithets and, therefore, are absolutely protected under the First Amendment to the United States Constitution;
- (2) plaintiff has admitted that certain factual statements complained of are true; and

(3) plaintiff cannot -- as a matter of law -- carry his burden of proving that any statement was published in a grossly irresponsible way, much less with knowledge of falsity or with reckless disregard for the truth;

and for such other and further relief as to this Court may seem just and proper.

This is an action for defamation.

Dated: New York, New York
November 11, 1987

Yours, etc.

Robert M. Callagy, Esq.
SATTERLEE STEPHENS BURKE
& BURKE
Attorneys for Defendants
DOUBLEDAY & COMPANY,
INC. and
SHANA ALEXANDER
230 Park Avenue
New York, New York 10169
(212) 818-9200

TO: LYMAN STANSKY, ESQ.
Attorney for Plaintiff
515 Madison Avenue
New York, New York 10022
(212) 753-9755

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X

HERMAN WEINER,

Plaintiff,

-against-

DOUBLEDAY & COMPANY, INC. and
SHANA ALEXANDER,

Defendants.

-----X

Index No. 29527/85

AFFIDAVIT IN OPPOSITION TO
PLAINTIFF'S MOTION AND IN
SUPPORT OF DEFENDANTS'
CROSS-MOTION FOR SUMMARY JUDGMENT

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

SHANA ALEXANDER, being duly sworn,
deposes and says:

1. I am the author of the book
entitled Nutcracker: Money, Madness,
Murder -- A Family Album (the "book"),

published in hardcover by Doubleday & Company, Inc. in 1985. In this defamation action, plaintiff complains about certain statements included in my book.

2. For more than 40 years I have been an investigative journalist, commentator, and author. I began my professional career in 1944 as a feature writer for the New York newspaper, P.M. I left P.M. in 1946 to complete my undergraduate degree at Vassar College. After graduation, I joined the staff of Life magazine and subsequently became Life's first woman staff writer and columnist. In 1969, I took my leave of Life to become the first woman editor for what was at the time the nation's largest women's magazine, McCall's. After three years at McCall's, I accepted an offer from Newsweek magazine where I wrote a regular column on national and international affairs. In addition to the book presently at issue, I have

written and had published five other books which include: Very Much A Lady: The Untold Story of Jean Harris and Dr. Herman Tarnower; Anyone's Daughter; Talking Women; Shana Alexander's State-by-State Guide to Women's Legal Rights; and The Feminine Eye. From 1970-1972, I contributed thrice-weekly news commentaries to the "Spectrum" series, which were broadcast by the CBS Radio Network. During the years 1974-1979, I contributed Point/Counterpoint commentaries to the "Sixty Minutes" news program aired weekly on CBS-TV. I am also a founder of the National Women's Political Caucus, and have served as a director of the New York State Council on the Arts. I have been the recipient of a number of professional awards including the Sigma Delta Chi and University of Southern California National Journalism Award and the Creative Arts Award of the National Women's Division of

the American Jewish Congress. I have received the Mystery Writers of America Edgar Allen Poe Award three times for Very Much A Lady, Anyone's Daughter, and Nutcracker. I have never before been sued for libel.

3. In Nutcracker I reported upon the widely publicized murder of the Mormon multi-millionaire, Franklin Bradshaw. The shooting of Franklin Bradshaw was carried out by his then 17 year-old grandson Marc Schreuder (found guilty of second-degree murder in 1982), who later confessed that he was following the orders of his mother, Frances Schreuder, the victim's daughter (found guilty of first degree murder in 1983). The book explores the family history of emotional disturbance that led up to the crime.

4. The distinguished author Tommy Thompson originally conceived the idea of a book chronicling the events surrounding

this strange patricide. Unfortunately, Mr. Thompson died while the book was still in the planning stage. Editors at Doubleday, who were familiar with my previous work, asked me to carry through on the project. While the original concept was Mr. Thompson's, Nutcracker is based entirely upon my own extensive research of the pathological development of Frances Schreuder, and her subsequent trial for murder.

5. In the course of preparing the book I was ably assisted by Alec Dubro, a professional researcher and writer, who had been recommended to me by the Center for Investigative Reporting in San Francisco. In all, Mr. Dubro and I spoke to approximately 250 different sources. All of the statements that plaintiff complains of in this action were based upon information that Mr. Dubro and I obtained during certain of these personal interviews.

6. Specifically, plaintiff objects to the statement that:

In 1966 Frances put herself for two years under the care of a Park Avenue psychiatrist named Herman Weiner, who seems to have encouraged his patient to stand up to her overprotective mother.

Frankly, I do not understand how this sentence could possibly be defamatory to Dr. Weiner, and I understand that plaintiff's attorney now says that the statement was included only to make for a coherent excerpt. In any event, the statement is an accurate report of information conveyed to me during interviews that I conducted with Mrs. Bradshaw (Frances Schreuder's mother), Marilyn Reagan (Frances's sister), and Robert Reagan (Marilyn's husband). At the time I interviewed these sources I considered them to be reliable, and for that matter I still do.

7. Plaintiff also objects to the statements that:

Berenice was attempting to infantilize her, Frances decided. She told Marc that Granny had a neurotic need for babies to smother which could account for Berenice's intense dislike of the man, she began to habitually refer to as Weenie, the big, fat, ugly Jew.

Again, I cannot see how these statements can be deemed defamatory of Dr. Weiner. They are clearly opinions -- my sources', not my own. I come from a Jewish family and do not endorse Mrs. Bradshaw's casual use of religious epithets. Nevertheless, it was important to my story to illustrate the intense conflict between Berenice and Frances, and Berenice's dislike for Dr. Weiner was a significant element of that conflict. It is my understanding that mere opinions and epithets of this kind cannot give rise to a libel action. Moreover, here, again, my account is an accurate report of the opinions expressed to

me during personal interviews that I conducted with Frances Schreuder, Mrs. Bradshaw, and Marilyn and Robert Reagan. (Copies of my notes of my meetings with Mrs. Bradshaw that substantiate this statement are annexed hereto as Exhibit "A.")

8. Plaintiff next objects to the statement that:

Robert Reagan remembers Dr. Weiner arriving in court to testify for Frances, during the divorce proceedings, eccentrically costumed in bright red slacks and a loud plaid jacket.

Once more, I cannot see how these statements can be defamatory of Dr. Weiner. This seems to me to be a simple statement of Mr. Reagan's opinion. What is fashionable dress to one person may be an eccentric costume to another. Mr. Reagan expressed this opinion to me during the course of my personal interviews with him.

(Copies of my notes of my meetings with the Reagans that substantiate this statement are annexed hereto as Exhibit "B.")

9. In his complaint, plaintiff also characterizes the following statements as libelous:

Marilyn Reagan remembers the size of one of his bills: Frances owed her psychiatrist \$3,000. "My understanding was that her problem was inability facing reality," says Marilyn. The huge unpaid bill made her sister think it might be the psychiatrist who had this problem, not his patient.

I am told that Dr. Weiner has admitted under oath that Frances did in fact owe him \$3,000. As to Marilyn Reagan's characterization of the bill as huge and unrealistic, that is plainly a matter of opinion -- an opinion that she conveyed to me during one of my interviews with her and her husband. (See Exhibit "B" hereto.)

10. Finally, plaintiff complains about the statement:

Later, when Behrens claimed that "Frances always slept with her shrinks," the Reagan said they were not at all surprised. They'd suspected "hanky panky," they confessed. Berenice had said the same.

Richard Behrens, who is quoted in this excerpt from the book, is a close friend of Frances Schreuder. My associate Alec Dubro interviewed Mr. Behrens on three different occasions and considered him to be a reliable source. (See Mr. Dubro's affidavit, submitted herewith.) Based upon Mr. Behrens's close personal friendship with Frances, I believed that he was in a position to know about her relationships with her therapists. And from my association with Mr. Dubro, I knew that he was an experienced investigative reporter who could be counted upon to relate Mr. Behrens's remarks accurately. Further-

more, when I wrote the book, I also had in hand the text of an interview I had conducted with Kathy Livingstone, an editor at Town and Country magazine, who was a friend of both Behrens and Frances Schreuder. Ms. Livingstone said that Behrens had also told her that Frances "always slept with her shrinks." (Copies of my notes of this interview are annexed hereto as Exhibit "C.")

11. As the book recounts, the Reagans told me in the course of a personal interview that they had "suspected hanky-panky" between the plaintiff and Frances Schreuder. (See Exhibit "B" hereto). In my interview with Berenice Bradshaw (Frances's mother), she independently told me of her belief that the plaintiff had a sexual relationship with Frances. (See Exhibit "A" hereto.) In light of these four separate reports, Mr. Dubro and I had

no reason to doubt the accuracy of the statement as published.

12. In editing the manuscript, my editors at Doubleday questioned me about various passages in the book including the paragraphs at issue in this case. In response to their questions, I informed them that I had received my information from reliable sources -- the immediate family and close personal friends of Frances Schreuder. To this day, I have not received any information that causes me to doubt the substantial truth of the paragraphs that plaintiff complains of. I continue to believe that these paragraphs are important to my portrait of Frances Schreuder and that I had ample support for each of the statements objected to by plaintiff.

/S/
SHANA ALEXANDER

Sworn to before me this
3rd day of November, 1987.

/S/
NOTARY PUBLIC

MARK A. FOWLER
NOTARY PUBLIC, State of New York
No. 4885930
Qualified in Westchester County
Commission Expires July 7, 1988

ALEXANDER'S NOTES

dontcha know? He got all tied up with this Mexican woman. He was fixin' to marry her. The only reason he didn't marry her -- she hadda have a blood test, and she didn't have it. Later, it turned out she had two kids! Two Mexican kids! I said to my daughter frances, I said: Guess who's coming to dinner?

I tell you, I don't know how she lives! I don't think she has too long to live. She has asthma so bad she can't barely breathe. She has bad lungs. A bad heart. She's got ulcers. Had a broke back.... And she was married to two of the meanest men that ever lived. That Vittorio... gonna testify against her...he beat her every day of her life, even when she was pregnant. She didn't expect her baby to look like a human being. He'd stomp on her belly. Stomp her all the time. Beat

those boys when they was just ages two and three. Frances was the first individual in New York State to get a divorce on grounds of cruelty to children. It's all in the records back there. You can look it up. Then she married this Dutchman, Schreuder, and he was meaner still. He broke her jaw. Banged her all up. I don't know how she's still alive. I really don't.

SA: Were her sisters nice to Frances when they were kids?

BB: She says not. Of course, I didn't notice anything. She says they'd lock her in the closet, then threaten to tell Mama if she cried, or anything.....Course, Frances has always been very neurotic. Very neurotic. She used to see this German Jew doctor in New York. Name was Herman Weiner. I hated him. I can't prove anything, but I've always felt that man hypnotized her, and used her sexually.

She went to him six years. He wasn't even a psychiatrist. Just a psychologist. Then he went to Canada.....

That Williams and Connolly found him again, in New York. She started back with him -- against my wishes. He charged her \$100 a visit. The first month. I got a bill for \$3,000. \$3,000!!—She'd had to have seen him every day! I hate him! Oh, I just hate him. I told that to my daughter Marilyn and she said: Good! Then I heard they broke up, she wasn't going to him any more. I asked Mike Rosen: "What happened between Frances and Weenie?" That's what we called him -- Weenie! Frances had given him so very valuable jewelry. A very expensive dresser set that had once belonged to the Queen of Egypt. [Not clear. Did Frances give this stuff to Weenie, and he refused to return it -- or what?]

Now she's seeing a lady, name of Elaine Gould. Frances likes her. She's a psychiatrist. I told Frances, I'll be glad to pay, if you'll just go. [After FJB's death, Grandma gave NYC Ballet \$300,000, at her daughter's urging, and Frances joined Ballet's Board.]

...Lincoln Kirstein is helping her a lot. And she was very close friends with George Balanchine. He was like a father to her. No, no, I never met Mr. Balanchine, but Frances told me. Last year Frances' 10-year-old daughter Lavinia was given the lead in "The Nutcracker." Then, just before they were going to announce it, this came out, in that scandal sheet -- The New York Times -- and they said she couldn't be the lead. Oh, I wept and cried. Lavinia and Frances were just heartbroken. This past summer, Lavinia and Frances were with the Ballet up at Saratoga, for the summer school.

They put out a new brochure, and they had Lavinia on the cover. Oh, Lavinia's such a beautiful dancer! That child's been dancing since she could walk. A perfectly beautiful little dancer! Her whole life has been the ballet. Frances too. She's just heartbroken she can't go to Paris with them next week. Yes, she's on the Board. And last Spring, they voted her unanimous to a new five-year term. Whenever I'm in New York, we just live at Lincoln Center, at the Ballet.

SA: Were any of your own 3 daughters good at ballet?

BB: Well, Frances took ballet in school.... But that little Lavinia, why, she's just taken to ballet like a fish to water. She has known

SA: _____ other people _____
unless it's to my rivals, another
chronicler of this story.

MR: I think I made it to Mike George (?)
too.

SA: Oh. Well, Dickie tells everybody
Frances slept with all her
psychiatrists. So--maybe she got the
idea from you.

MR: No. _____.

SA: Well, maybe she did.

MR: Well, he claims she slept with an
awful lot of people.

SA: Uh-huh.

MR: He said you introduce her to somebody
and the next thing you know she's
shacking up with him.

SA: How did she handle the children with
all the sex going on?

MR: Well, when she had that two-bedroom
with the dining alcove, the dining
alcove had been partitioned off and

it was like a little separate room adjacent to the kitchen, and she had a convertible sofa in there. She also had a great big bedroom--I mean a bedroom of her own with a queen size bed in it.

SA: So she could bring the boyfriends into the bedroom and put the children on the sofa?

MR: No, the boys had their own bedroom when she moved to East End Avenue. Madison Avenue I don't know about. But she went off--that's why I reported her for child neglect. She went off with her boyfriends for weekends, leaving the boys unattended.

SA: Uh-huh. (conversation about emphysema and smoking)

MR: --is my understanding. And --

SA: Well, I know she stashed her so-called evidence with Dickie.

MR: Yeah, so it wouldn't--I mean it's the whole--

BR: What? Her evidence against Vittorio?

SA: Yes.

MR: The whole psychological thing is paranoid.

SA: I think so.

MR: I continually detect paranoia.

SA: She had a psychiatrist for a long time named Wiener. Your mother called him Weenie and she hates him.

BR: That's the one with the loud jacket and he ran up a bill for \$3,000. Yeah, and red trousers.

MR: I had--you know he came to the divorce proceedings, the separation proceedings--

SA: Against Vittorio?

MR: Yeah. And I was surprised at his dress, and now that I know a few more psychiatrists I guess I wouldn't be so surprised. _____ showing up in a courtroom.

SA: What was he dressed like?

BR: _____ walked into the Supreme Court decked with a nice red blazer, which, you know, _____.

SA: He had a red blazer on?

MR: No, was it red? He had a sport jacket on--a noticeable sport jacket.

SA: A loud sport jacket. You didn't think that was appropriate for court?

MR: No, not when you were trying to say your client was--

BR: _____ about the same age as Frances?

SA: I never met him. I don't know.

MR: I'd say he's about her age, but--I guess I'm the one that made this

comment I shouldn't have, but I will make it again and clarify it. My understanding was he said that her problem was inability to face reality, I guess, which would mean with regard to money. And yet he let the bill get way up, so I questioned--

SA: He let the bill go up to \$3,000?

MR: I thought it was \$1,800.

BR: I thought it was \$3,000. Marilyn and I had a long discussion about it because we were--our understanding was that psychology was that it's very important that they keep

_____.

MR: That they keep paying for it.

BR: Yeah, otherwise you lose track of it.

MR: So I wondered if there wasn't a little hanky-panky going on.

SA: Between the two of them? A romance you mean?

MR: Yeah. That was just a wonder on my
part, and I made that statement
before--which I shouldn't have--and
since I'd made it before,

_____ 1.

KATHY LIVINGSTONE, interview, Delmonico's, NO ATTRIBUTION, 10/25/83. A good-looking, dimpled, Julie Christie-ish blonde, early 40s, intelligent and perceptive, socially acute, Hungarian-born -- Kathy, a Town & Country longtime editor, is a welcome surprise in this mostly-creepy Cast of Characters.

Kathy was principally Behrens' friend. She met him through Dick KOMING, at a party in 1961, nr Columbia University, shortly after Kathy arrived NYC from Hungary via Cleveland. She was then a fledgling ad copywriter, and since the party was in a "questionable neighborhood," Behrens escorted home several of the female guests. After that, he took to telephoning her. Kathy found the approx 10-yrs-older man "very amusing." There were a few dinners. "He was extremely smart, in a strange, oblique way. Very

much wanted Kathy to meet his father in New Jersey, a doctor.

"Dick was obsessed with his own inheritance." Even when his mother was alive, before his father could have married the "slut," he talked continually about losing his "inheritance." Kathy thinks the father had a girlfriend on the side, and perhaps a child. "Dick was threatened very much even then by them. Someone should get rid of them! he kept saying.

Behrens also was obsessed by the Eastern WASP establishment. He had attended either St. Pauls or perhaps Exeter, then been kicked out. (Or it could have been that he had gone to second-string schools and made up these other credentials.) "But he certainly knew the Social Register; and the Eastern educational establishment. Dick Behrens had an abso-

lutely encyclopedic knowledge of who and what was preppy, and what was not. He also knew all the right clubs.

Dick had an older brother, Robert, who was in the USIA, and was an "achiever", which Dick was not. Dick hung out with and was often seen with a couple who lived on the fringes of Beekman Place: Joy and Tony Da Chiara. At 1st Ave. and 50th St. (Kathy then in her 20s; on her way up. They were then in 40s, even early 50s, and already on the way down. Joy's father: ex-Prez of Young & Rubicam, and a close friend of Bernard Malamud. Always a lot of drinking at the Da Chiaras. Joy was well-brought-up, but for some reason had "only made it to the stewardess level." They all knew Bob Behrens, in the USIA. He was posted to Morocco in the early '60s.

"You must take a look at Dick Behrens' resume! It's fantastic. 4 pages long.

(but he was fired from most or all of the jobs). Worked for Prentice-Hall, Leitz Microscope. Taught at a private school in Dobbs Ferry. Kathy shocked that Frances' trial attorneys -- who came to interview her at one point, but I don't think she agreed to cooperate; probably citing her fear of crazy Behrens -- knew so little about all their past lives.

As his name indicates, Behrens came from a German background, German stock, and he "had a love-hate relationship with his German-ness. Also with "Jewishness." Very ambiguous feelings on both subjects. He used to make brilliant but sick joke phone calls to her office and leave messages: Say Hitler called, coupled with some brilliant but sick-offensive joke made up out of the day's headlines. Erratic. Could call 6 times a day, and then she wouldn't hear from him for

months. "He was quite cultured in some areas."

Talk to Stafford "Stu" Bryan(t). He really knows Dick Behrens's story. Bryan(t) is ex-southern prep school, now a respected editor of architectural books, who wears British tweeds. A true Virginia gentleman today, with a tough, strong French wife.

Behrens was invited to visit Bryan(t)s in Virginia, but not asked back after he characterized Stu's mother as a lesbian at a family dinner party (or something equally outrageous.)

Behrens was fired from all his jobs because of his drinking binges. After Kathy married, she moved to East 90s, and remembers one day running into Behrens, unshaven and raggedy, coming out of a 1st Ave bar. He was very fat, was wearing

used clothes bought at thrift shops, and carried more clothes in a paper bag. He drank with shady characters in these bars, and talked a lot. Knowing whereabouts of bigtime ex-Nazis in hiding was a big part of his chat.

For a time he had a live-in girlfriend with the pretty name of KOMING Ellady. She was crippled. They lived together for a while, but relationship came to "a violent end."

Behrens met both Frances and Marilyn at Unitarian Church at 80th and Lexington. Behrens always claimed Marilyn was a lesbian. The hangers-on at the church were a special group: "a lot of lost souls there looking for men; rich people looking for companionship in their own class; ne'er-do-wells and remittance man-types. Kathy surmises this may be because Unitarians "came from Transylvania; the

Unitarians are non-Christian. Like the Mormons, they deny the holy trinity.

Frances Schreuder always boasted that her ancestors were founders of some important New England school.

Behrens said Frances always slept with her shrinks.

Kathy believes Frances was quite active sexually, though can supply no details. Recalls seeing her in bikini at Fire Island and noting that she had a surprisingly nice figure, although she was also entirely, literally flat-chested. This was an occasion when Frances invited Kathy and Behrens to her home at Fair Harbor for a day at the beach.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----x
HERMAN WEINER,

Plaintiff,

-against-

DOUBLEDAY & COMPANY, INC. and
SHANA ALEXANDER,

Defendants.

-----x
Index No. 29527/85

AFFIDAVIT IN OPPOSITION TO
PLAINTIFF'S MOTION AND IN
SUPPORT OF DEFENDANTS'
CROSS-MOTION FOR SUMMARY JUDGMENT

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

JAMES MOSER, being duly sworn, deposes
and says:

1. I was employed by Doubleday &
Company, Inc. ("Doubleday") for eight
years in a variety of editorial positions.

Samuel S. Vaughan, who was at the time employed as an editor-in-chief at Doubleday, and I edited NUTCRACKER: MONEY, MADNESS, MURDER, A FAMILY ALBUM (the "Book") which was written by Shana Alexander and published in hardcover by Doubleday in 1985.

2. My duties as an editor at Doubleday included acquiring books from independent authors, such as Shana Alexander, working with authors in the preparation of their manuscripts for publication, and assisting in the promotion and marketing of the published books.

3. Prior to the time Doubleday entered into a contract with Shana Alexander for the Book, I had become familiar with Shana Alexander's previous publications, as well as with her reputation as an investigative journalist. Shana Alexander had five published books of nonfiction to her credit. She had also worked in various capacities

for such magazines as McCall's, Life and Newsweek. She had received the Mystery Writers of America Edgar Allen Poe Award for Very Much A Lady, her non-fiction account of the murder of Dr. Herman Tarnower by Jean Harris, and for Anyone's Child, her account of the Patty Heart kidnapping.

4. Originally, Doubleday had contracted with Tommy Thompson to write about Frances Schreuder's role in the murder of her multi-millionaire father, but Thompson died while the book was still in the planning stage. Doubleday then approached Alexander to carry on with Thompson's project because of her excellent reputation for researching and writing books of this genre. Indeed, the syndicated newspaper columnist James Kilpatrick had called her "the finest court reporter to come along since Rebecca West went to Nuremberg." Alexander accepted the offer

as an independent contractor; she has never been an employee of Doubleday. Throughout the Book's preparation, I was in regular contact with the author, making editorial suggestions, as well as questioning her about statements Doubleday believed might be problematic from a legal standpoint. I knew that the facts set forth in the Book were largely drawn from her personal interviews with family members and close friends of the Book's subject -- Frances Schreuder.

5. Any material that could possibly raise the issue of libel, invasion of privacy, or copyright infringement was reviewed by Doubleday's legal department. As it generally does when publishing non-fiction crime books of this kind, Doubleday also sent the manuscript to outside counsel, who are recognized as specialists in the law of libel. The outside law firm read the manuscript and

suggested that the author supply the substantiation for certain statements appearing therein. After this internal and outside review, a member of Doubleday's legal department met with Alexander and was satisfied with the substantiation that she provided.

6. At no time did Doubleday or I ever suspect that anything said in the Book about plaintiff was false. Indeed, at all times, I believed all statements to be true.

/S/
JAMES MOSER

Sworn to before me this
6th day of November, 1987.

/S/
NOTARY PUBLIC

MARK A. FOWLER
NOTARY PUBLIC, State of New York
No. 4885930
Qualified in Westchester County
Commission Expires July 7, 1988

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----x

HERMAN WEINER,

Plaintiff,

-against-

DOUBLEDAY & COMPANY, INC. and
SHANA ALEXANDER,

Defendants.

-----x

Index No. 29527/85

AFFIDAVIT IN OPPOSITION TO
PLAINTIFF'S MOTION AND IN
SUPPORT OF DEFENDANTS'
CROSS-MOTION FOR SUMMARY JUDGMENT

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

ALEC DUBRO, being duly sworn, deposes
and says:

1. I have been a free-lance journalist
for the last 19 years, and have written
and published many investigative articles.
While working in this capacity for the

Center of Investigative Reporting, in San Francisco, Shana Alexander contacted me to assist her in gathering information for her book, Nutcracker: Money, Madness, Murder -- A Family Album (the "Book").

2. Ms. Alexander asked me to interview certain close friends of Frances Schreuder, the book's subject. At the time I began my research, Frances and her son Mark had been charged with the murder of the Mormon multi-millionaire Franklin Bradshaw, who was Frances's father.

3. One of the individuals that I interviewed was Frances's close friend and confidant, Richard Behrens, whom the State of Utah had asked to certify in connection with the criminal trial. On three separate occasions I met with Behrens to discuss his personal friendship with Frances and his knowledge of the events in which she had been involved. During the three interviews, which averaged approximately

an hour and a half in length, Behrens spoke in great detail concerning Frances's medical condition and psychological makeup. This necessarily included discussion of the therapists that Frances frequented, including Dr. Weiner.

4. The statement that "Frances always slept with her shrinks" was volunteered by Mr. Behrens during one of my interviews. Because of his close personal relationship with Frances, I had no reason to doubt the veracity of his recall. In fact at the time I interviewed Mr. Behrens, I was struck by the vividness of his recollections of the events in which Frances and her family had participated. Moreover, much of what Behrens told me was also reported by other sources that Shana Alexander and I had interviewed, which tended to confirm that Behrens's version of events was truthful and accurate.

5. Briefly, I would like to summarize my nineteen years of professional experience as a journalist. After graduating from the University of Massachusetts, I began writing for Rolling Stone magazine, among others. In 1975, I covered the Patty Hearst kidnapping for Rolling Stone. In 1980, I joined the Center for Investigative Reporting. While working for the Center, I covered stories on Japanese organized crime, which included research for the television news show 20/20 and I was an editor of the book entitled Nuclear California. In 1985, I co-authored the book entitled Yakuza on the Japanese mafia, which won the Investigative Reporters and Editors (IRE) annual book prize in 1987. In addition, I have written articles for Science Digest, Mother Jones, California Magazine, Venture Magazine, and California Lawyer. I have provided investigative services for

the President's Commission on Organized Crime and the U.S. Senate Permanent Subcommittee on Investigations. I have never been sued for libel.

6. I had no reason to doubt that Mr. Behrens was in a position to know about Frances Schreuder relationship with her therapists and that he was telling me the truth.

/S/
ALEC DUBRO

Sworn to before me this
9th day of November, 1987.

/S/
NOTARY PUBLIC

MARK A. FOWLER
NOTARY PUBLIC, State of New York
No. 4885930
Qualified in Westchester County
Commission Expires July 7, 1988

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----x

HERMAN WEINER,

Plaintiff,

-against-

DOUBLEDAY & COMPANY, INC. and
SHANA ALEXANDER,

Defendants.

-----x

AFFIDAVIT IN OPPOSITION TO
PLAINTIFF'S MOTION AND IN
SUPPORT OF DEFENDANTS'
CROSS-MOTION FOR SUMMARY JUDGMENT

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

ROBERT M. CALLAGY, being duly sworn,
deposes and says:

1. I am a member of the bar of the
State of New York and a partner in the
firm of Satterlee Stephens Burke & Burke,
attorneys for defendants Doubleday &

Company, Inc. ("Doubleday") and Shana Alexander ("Alexander"), in this constitutional defamation testimony relevant to plaintiff's motion, and defendants' cross-motion, for summary judgment.

2. On October 22, 1985, and November 19, 1985, plaintiff served identical copies of the verified complaint in this action upon Doubleday and Alexander respectively. (A copy of the complaint is annexed hereto as Exhibit "A.") Defendants Doubleday and Alexander served their respective answers on November 19, 1985, and December 6, 1985, copies of which are annexed hereto as Exhibits "B" and "C."

3. Plaintiff's deposition in this case had to be conducted in three separate sessions on April 21, 1986, July 9, 1986, and January 16, 1987, because plaintiff's attorney objected to -- and plaintiff refused to answer -- no fewer than 337

questions. Copies of pages 25, 34--35, 37, 39--40, 45, 48, 50, 55, 57--58, 60, 64, 73--74, 79--80, 82--83, 98, 112, 115--16, 178, 180, 187, 190, 227--29, 258, 260, 262, 265--67, 269, 297--300, and 307 from the deposition transcript are annexed hereto as Exhibit "D." Following is a brief summary of certain of the testimony herein.

4. Dr. Weiner admitted seeing Frances Schreuder as a client from 1961 to 1964, from 1966 to 1968, and again from 1982 to 1983. (Weiner Dep., pp. 60, 65, 73, 80, 82--83, 260, 262, and 307.) He admitted that from 1961 through 1964 alone, Frances Schreuder visited him at his office for approximately seventy to eighty sessions, averaging about fifty minutes apiece. (Weiner Dep., pp. 60, 73.) There were approximately sixty additional sessions in the period from 1966 through 1968. (Weiner Dep., p. 80.)

5. Dr. Weiner admitted that from 1961 to 1964 he charged approximately \$35 to \$40 per session, raising his fee to \$50 per session during the 1966 through 1968 period, and to \$100 per session in 1982 through 1983. (Weiner Dep., pp. 65, 82, 262.) He admitted that Nutcracker accurately reported that Frances ran up an unpaid bill of \$3,000 between 1966 and 1968, which was ultimately paid with money from Mrs. Bradshaw (Frances Schreuder's mother). (Weiner Dep., pp. 80, 83, 260.) He also produced a letter from Mrs. Bradshaw concerning this bill, in which she described the balance due as "staggering." (A copy of this letter is annexed hereto as Exhibit "E.")

6. Defendants believe that plaintiff qualifies as a limited purpose public figure by reason of his acknowledged prominence as a psychotherapist, his activities in the controversial field of Primal

Therapy, his public appearances and published writings, and his involvement in two highly publicized legal proceedings concerning Frances Schreuder. Dr. Weiner has admitted that he holds a Ph.D. in clinical psychology and has published in numerous journals including: Primal Community, The Archives of Psychology, The Journal of the New York Society of Clinical Psychologists, The Journal of Nervous and Mental Disease, and A.M.A. Archives of General Psychiatry. In several of these journals, plaintiff has published two or more articles. (Weiner Dep., pp. 34--35, 112, 115--16.) Dr. Weiner has appeared as a guest speaker on university campuses and at professional societies, including the State University of New York at Buffalo, York University in Toronto, and the Institute of Practicing Psychotherapists. (Weiner Dep., pp. 37, 39--40, 45, 227-28.) He has been

interviewed over the radio about the causes of depression and mid-life crisis and has discussed these same topics on television. (Weiner Dep., pp. 44-45, 180, 229, 297--98, 300.) He has been active in professional organizations, including the International Primal Association. (Weiner Dep., pp. 180, 297-98, 300.) In connection with the International Primal Association, he has conducted workshops on male psychology which involved "directed physical contact or undirected physical contact between participants." (Weiner Dep., pp. 57--58, 299.) He has also been a member of the New York Society of Clinical Psychologists, —the American Psychological Association, and the National Psychological Association for Psychoanalysis. (Weiner Dep., pp. 50, 55.) He has taught at Einstein Medical College, Cornell University Medical College, York University in Toronto, and

the Institute of Practicing Psychotherapy.
(Weiner Dep., pp. 48, 178.)

7. Dr. Weiner voluntarily injected himself into the turbulent life and legal problems of Frances Schreuder. He testified at a highly publicized custody trial that Frances Schreuder was a "fit mother." (Weiner Dep., pp. 74, 258, 269.) In light of the fact that this opinion subsequently proved to be tragically mistaken, the press and the public must be permitted considerable freedom to inquire into the nature of plaintiff's relationship with Ms. Schreuder. Plaintiff also met with defense attorneys about the possibility of testifying at Ms. Schreuder's murder trial, and again acted as her therapist after she had been charged with her father's murder. (Weiner Dep., pp. 98, 187, 267.)

8. Finally, I respectfully inform the Court that plaintiff's attorney has

expressly waived any defamation claim based upon the report in Nutcracker that plaintiff encouraged Frances to stand up to her overprotective mother, and other assertions related thereto. Plaintiff's attorney belatedly indicated that these statements had been included in the complaint only "to make an understandable excerpt." (Weiner Dep., pp. 265-66.)

/S/
ROBERT M. CALLAGY

Sworn to before me this
9th day of November, 1987.

/S/
NOTARY PUBLIC

MARK A. FOWLER
NOTARY PUBLIC, State of New York
No. 4885930
Qualified in Westchester County
Commission Expires July 7, 1988

DEFENDANT'S EXHIBIT - WEINER DEPOSITION

Weiner 25

A. After graduation I entered the master's program, graduate program, of Brooklyn College, and I was there for two years.

Q. In what field of study?

A. Psychology.

Q. What major did you receive your degree in at Brooklyn College?

A. Well, I majored in psychology.

Q. Did you receive a master's degree from Brooklyn?

A. No.

Q. So you pursued the master's program from 1950 to 1952?

A. Yes.

Q. On a full-time basis?

A. No, this was evening.

Q. What did you do during the daytime?

A. I attended my business.

Q. You have previously testified that you stopped being in the business of coin metered machines in apartment house basements in 1956?

A. Yes.

Q. Were you the owner of the business at the time?

Weiner 34-35

Q. Yes.

A. Maybe an average of one or two. Probably one, if that many.

Q. Have you ever written any articles for publication in professional journals?

A. Yes.

Q. Can you tell us whether or not you have been published in professional journals?

A. Yes.

Q. Could you give us the names of the journals in which you have been published, and when?

A. The Archives of Psychology. This is a period of '57 to '61 or '62, I think, several articles.

Q. That appeared in that publication?

A. Yes.

Q. Since 1961 have you had anything published?

A. Yes.

Q. Where did any article or piece appear?

A. I don't remember the dates after that. One was the journal of the New York Society of Clinical Psychologists.

Q. How many such articles appeared in that journal that you wrote?

A. I think just one.

Q. Do you recall when it was? Was it in the sixties or in the 50's?

A. The sixties, I believe.

Q. Any other articles that you can recall?

A. There were two or three articles in a journal called Primal Community.

Q. When did those articles appear?

A. In the middle to late seventies.

Q. Did you write each of these articles yourself?

A. Myself.

Q. Any other articles that you wrote that were published?

A. This is all I can recall right now.

Q. Do you have copies of all of these articles?

A. Probably.

Q. Could you produce copies to us, please?

MR. STANSKY: I object to that.

MR. CALLAGY: You object? Is that what I hear you say?

MR. STANSKY: Yes.

Weiner 37

Q. Before what groups or associations have you spoken?

A. I'm trying to recall. York University, Toronto. SUNY Medical School at Buffalo. The Institute of Practicing Psychotherapists.

Q. When did you speak before an audience at the York University in Toronto?

A. Oh, probably 1974.

Q. Did you deliver a paper to that audience?

A. I never read papers to audiences.

Q. Did you have a speech that you had prepared?

A. I had notes, yes.

Q. Do you still have those notes?

A. I don't know.

Q. Would you search your records to see if you have a copy of the speech that you delivered in 1974 at York University in Toronto?

MR. STANSKY: That is objected to.

MR. CALLAGY: The witness did not respond as to whether he would search his records to see if he had it.

MR. STANSKY: I object to that

Weiner 39

that. You can object to having him produce it, but what you are requiring, Mr. Stansky, is that we are going to have a number of sessions of this man's deposition before we can conclude this matter. If you won't even let him tell us whether he has a copy --

MR. STANSKY: If you insist on asking irrelevant questions, this will go on forever, of course.

MR. CALLAGY: It probably will.

MR. STANSKY: That is up to you, up to a point.

Q. How about the speech that you gave to the Institute of Practicing

Psychotherapists, when did you give that speech?

A. 1981, I think.

Q. Was that a speech in which you were the sole speaker or were you on a panel?

A. I was a sole speaker.

Q. What was the subject of that speech?

A. Technical aspects of psychoanalysis.

Q. How about the speech you gave at SUNY in 1978, what was that about?

A. Mind/body relationships.

Weiner 40

Q. Would you check your files and see if you have a copy of the speech that you delivered to the Institute of Practicing Psychotherapists?

MR. STANSKY: Objection.

MR. CALLAGY: I would ask you to produce that.

Q. What was the topic of the discussion at York University of Toronto back in 1974 when you appeared as a panelist?

A. Again, it had to do with mind/body problems.

Q. Can you describe briefly to me what mind/body problems are?

A. Interrelationships between mind and body, reciprocal effects.

Q. You mentioned earlier that you had written two or three articles in the journal called Primal Community. Do you recall the titles of those articles?

A. No, I don't.

Q. Were the articles each in your name as author?

A. Yes.

Q. Have you now given me all of the articles

Weiner 45

A. I don't recall specific questions, but the interview was about midlife crisis.

Q. Do you know whether the interview was broadcast?

A. Yes, it was.

Q. Did you hear it when it was broadcast?

A. No.

Q. Did you receive a tape of the interview?

A. I did, but it got lost in transit when I moved.

Q. So you don't have it today?

A. I don't think so.

MR. CALLAGY: Would you search your records, and if you have a copy of the tape of the transcript, if you would produce that, please?

THE WITNESS: Yes.

Q. Have you ever appeared on television?

A. Yes.

Q. When did you first appear on TV?

A. Late seventies.

Q. How many times have you been on TV?

A. One time.

Q. Do you recall the show that you appeared

Weiner 48

Q. By the way, do you have any affiliation with any hospitals?

A. At the present?

Q. Yes.

A. No.

Q. Have you ever had any affiliation with any hospitals?

A. Yes.

Q. When was the last time you had an affiliation with a hospital?

A. 1962, I believe.

Q. What hospital were you affiliated with?

A. Einstein Medical College.

Q. What was your affiliation?

A. Assistant professor of psychology.

Q. How long were you on the teaching staff of Einstein Medical College?

A. An academic year.

Q. Have you ever received any governmental grants of any kind?

A. No.

Q. Have you ever had any portion of your salary paid by Federal, state or local governments?

A. Yes.

Weiner 50

A. The Institute of Practicing Psychotherapists.

Q. When did you have that part-time instructorship?

A. That was for a half year in 1981, I believe.

Q. Have you ever advertised your services as a psychologist?

A. No.

Q. Are you on any referral list that you know of as a psychologist?

A. I am, yes.

Q. What referral lists are you on?

A. The New York Society of Clinical Psychologists.

Q. How long have you been on that referral list?

A. For a year and a half.

Q. Are you on any other lists that you are aware of?

A. I can't think of any.

Q. You have indicated that you are a member of the American Psychological Association.

A. They don't have a referral list.

Weiner 55

A. That's it.

Q. Did you go to meetings of the Ontario Psychological Association?

A. Perhaps one or two times.

Q. Did you maintain your membership in the United States psychological associations while you were in Canada?

A. Yes.

Q. Do you belong to any other U.S. or have you belonged to any other U.S. psychological associations?

A. Yes.

Q. Which ones?

A. The National Psychological Association For Analysis.

Q. When did you first join that organization?

A. Well, that's an analytic training institute. In 1968 I became an associate member after having gone through their program.

Q. When did you go through the program?

A. Completed in 1968.

Q. How long a period does the program take?

A. It's maybe eight years.

Weiner 57-58

Q. What associations have you been a member of?

A. It's called the IPA.

Q. What is the IPA?

A. The International Primal Association.

Q. When did you join that organization?

A. 1972, I believe.

Q. What is the purpose of that organization?

A. Discuss various psychological techniques of treatment.

Q. Have you been published by that organization?

A. Well, I referred to that before.

Q. Have you spoken before that organization?

A. I probably gave a workshop or two, yes.

Q. When did you give the workshop or two?

A. It was in the seventies, early to mid seventies.

Q. What was the subject of the workshop?

A. Male psychology.

Q. Can you just briefly describe what that is all about?

A. Well, that was an exploration of the differences between male and female psychology and the ways in which male psychology is problematic because of the cultural demands on what a man should be, and on the other hand, what potentials men

do have, if they dare realize them, what potential men do have in being fuller people, more expressive personalities.

Q. Were you paid for giving these workshops?

A. No.

Q. Were you paid for giving any of the speeches you have referred to earlier?

A. I don't think so. No, I don't think so.

Q. Have you written any papers that were never published?

MR. STANSKY: I object to that.

Q. Have you submitted other papers for publication which were not published?

MR. STANSKY: I object to that.

Q. Have you ever treated a woman by the name of Frances Schreuder?

A. Yes.

Q. When did you first treat that woman?

A. 1961.

Q. Who referred her to you?

A. Dr. Nat Robbins.

Q. Who is Dr. Nat Robbins?

Weiner 60

New York to Toronto?

A. I'm sure I did.

Q. Did you ever make a claim for the loss of the records?

MR. STANSKY: I object to that.

Q. Can you describe what else you lost in transit from New York to Toronto?

MR. STANSKY: I object to that.

Q. Do you have any idea of how many times you saw this woman?

A. I could give an estimate. Maybe 70 to 80 times in this period.

Q. Did you always see her at your apartment and office?

A. Not always, no. At that time I did, at that time, '61 to the beginning of '64, I believe.

Q. So that you saw her 70 to 80 times between 1961 and 1964?

A. Yes.

Q. How long would these consultations last?

A. Well, nominally, 50 minutes.

Q. Would you maintain records of the consultations?

A. I'm sure I had notes.

Weiner 64

MR. CALLAGY: On what grounds?

MR. STANSKY: Confidentiality.

MR. CALLAGY: He is maintaining a defamation claim here relating to certain statements in the book.

Whose confidentiality is he asserting here?

MR. STANSKY: He is compelled by law not to divulge anything that went on between him and his patient or client, whatever you may call her.

MR. CALLAGY: Is that the basis on which he is refusing to --

MR. STANSKY: I beg your pardon?

MR. CALLAGY: Is that the basis on which he is refusing to produce his notes?

MR. STANSKY: He hasn't refused to produce any notes. He told you he doesn't have them, but if he had them, he would not produce them for the same reason. He is bound by the statute --

Q. When did you last see --

MR. STANSKY: -- bound by the statute to consider these communications

Weiner 79

may have replied via phone.

Q. Do you have today the letter that Berenice referred to as having earlier been sent to you from her?

A. Berenice -- I think if I had it, I would have produced it.

MR. STANSKY: Off the record.

(Discussion off the record.)

Q. Do you recall what her earlier letter to you was about, which is referred to in the first sentence of Exhibit C?

A. I don't recall, but from the content of this letter I would surmise that it was similar.

Q. You are referring to Exhibit B?

A. Yes.

MR. KAGEL: C.

THE WITNESS: C. That's C, isn't it?

Q. Exhibit C.

A. Yes.

Q. It says, and I quote, "I did not know that Frances had been seeing you all this time. Your extreme kindness and interest in helping her all this time without remuneration moves me to deep gratitude."

Weiner 73-74

receive a referral from him.

Q. You testified that you never had received a referral from him before?

A. Not to my recollection. I may have and maybe it didn't work out.

Q. At the time that Frances was referred to you, did you talk with any of her other doctors about her?

A. No.

Q. Did you talk to any of her family members?

A. No.

Q. You have testified that between '61 and '63 you had approximately 70 to 80 consultations. You have also indicated that some of those consultations may not have transpired at your home and office.

Can you tell us where those consultations may have been?

A. I don't recall saying that. They all transpired at 255 West 88th Street, where I had my offices during that period.

Q. In the letter which is Exhibit B for identification, Mrs. Bradshaw refers to your testimony in court as extremely beneficial.

Did you testify?

A. Yes, I did.

Q. In what proceeding did you testify?

A. Custody case.

Q. Who did you testify about?

A. Well, since it's a court record, I guess I can. About Frances' viability as a mother, which had been contested by her husband in a custody case.

Q. Where did you testify?

A. In Manhattan.

Q. Do you recall the judge that you testified before?

A. I remember him, but I don't recall his name.

Q. Do you recall the address where you testified? Was it at the Supreme Court building at 60 Centre Street?

A. May have been.

Q. Over how many days did you testify?

A. I believe it was just one day.

Q. Prior to testifying, were you prepared by Frances' lawyer?

A. Of course.

Q. Who was that lawyer?

Weiner 80

It goes on, "Of course it is impossible for us to pay this staggering amount at this time but I hope some time in the future we can compensate you for the time spent with her."

You previously testified that your account was brought up to date as of

August 6, 1963, when you received Exhibit B, is that correct?

A. Right.

Q. Thereafter you continued to see Frances Schreuder.

A. For a short period, if I saw her after that period. This refers to the period of 1966 to 1968, this refers to the \$3,000, to that bill that was mentioned in the Nutcracker.

Q. So that between 1966 and 1968 you saw Frances again?

A. Yes.

Q. On how many occasions did you see her during this period?

A. Approximately, I would say, at least 60 sessions.

Q. Where did you see her?

A. This was at 955 Park Avenue.

Q. Did you have an office at 955 Park

Weiner 82-83

had a regular appointment, once a week or twice a week as the case may have been. I think it was once a week.

Q. Who scheduled these appointments, did she or did you?

A. Patients are assigned an hour. It's their hour. You might say I lease my time. They're responsible for that hour, whether they come or not, unless they give me due notice.

Q. So they pay for the time whether they come or not?

A. Yes, unless they give me sufficient notice so I can reutilize the time. It's standard practice.

Q. Between 1966 and the date of January of '68, you say you saw her approximately 60 or so times.

A. I believe so.

Q. At that time, what was your hourly or consultation fee?

A. At that time I believe it was \$50, between 50 and \$60. She was paying 50, I think.

Q. During these consultations did she ever come with anyone else to see you?

A. No.

Q. During this two-year period, did you ever meet with Berenice?

A. No.

Q. Did you ever meet with any of the children?

A. No.

Q. Did you know a man by the name of Behrens?

A. No.

Q. Have you ever met him?

A. No.

Q. Did you know the Reagans, Robert and his wife?

A. No.

Q. Did you ever talk to them?

A. No.

Q. I take it you didn't know Marlin?

A. No.

Q. So that between 1966 and 1968, this patient again ran up a fairly sizable bill?

A. Yes.

Q. At the time of Exhibit C, how large would you say the bill was, approximately \$3,000?

A. Approximately \$3,000 at that point, yes.

Weiner 98

with her?

A. Well, I had dinner [lunch, not dinner] with her lawyer, Mike Rosen. I met him to discuss a possible role in her trial, and she was present as well.

Q. Where was that?

A. It was in Chinatown somewhere.

Q. Was that before your testimony?

MR. STANSKY: I object to the question on the ground it doesn't relate to a specific time. The custody proceeding was 1963 and this is a 1980 matter [1980 matter - in 1983] he is talking about, and that's very confusing.

Q. So that in 1980 --

MR. STANSKY: Not 1980. In the 1980's, I said, when she was on trial for murder.

Q. Did you have occasion to testify again?

A. No.

Q. Were you consulted by her counsel regarding your testimony?

A. Which testimony are you talking about?

Q. Mr. Rosen, you said, met with you in Chinatown to discuss your testimony.

A. To discuss possible testimony.

Weiner 112

understanding.

MR. CALLAGY: It is my position that you do not alter anything in a transcript.

Q. Dr. Weiner, in response to my request for documents at the last session of the deposition your counsel has handed me three papers that appear to have been published by the American Medical Society or the Journal of Medical Diseases in or about 1969 or 1960.

A. Right.

Q. Are these the only documents that you brought with you to this session of the deposition?

A. Yes.

Q. At our last session I asked you to produce a copy of the speech that you claim you delivered in 1974 at York University in Toronto. Is that speech among the papers that you have produced today?

MR. STANSKY: I object to the question.

Q. It is not among these.

MR. STANSKY: I object to it.

Q. Have you searched your records to ascertain whether or not you have that speech?

MR. STANSKY: I object to the question.

Weiner 115-116

a page entitled Somato-Psychologic Studies In Parkinson's Disease, which bears the indication that it was reprinted from the Journal of Nervous and Mental Disease in September of 1959. This will be Defendants' Exhibit D for identification.

(Documents entitled Somato-Psychologic Studies In Parkinson's Disease marked Defendants' Exhibit D for identification, as of this date.)

Q. I show you what has been marked as Exhibit D and I ask you, what, if any, role you played in connection with the publication of that paper?

A. I am listed as the second author of this paper. There are three authors. As I recall, I did some of the testing and substantial amount of library research in writing the paper.

Q. Is there any way you can tell, what, if any, portion of the paper you wrote?

A. I would have to really examine this extremely closely and try to recollect as precisely as possible.

Q. Do you know which of the various co-authors did the major work in terms of writing the paper?

A. I would say Dr. Riklan and myself.

Q. Did you receive any compensation at all for writing this paper?

A. No.

MR. CALLAGY: I would next like to mark the only other document produced today as Exhibit E, which is an article that appears in two parts, entitled Psychological Studies on the Effect of Chemosurgery of the Basal Ganglia in Parkinsonism. You can mark this as Exhibits E and E-1.

(Document entitled Psychological Studies on Effect of Chemosurgery of the Basal Ganglia in Parkinsonism marked Defendants' Exhibit E for identification, as of this date.)

(Document of the same title marked Exhibit E-1 for identification, as of this date.)

Q. I show you what has been marked as Defendants' Exhibit E and E-1, and I ask you, what, if any, role you played in connection with the preparation of those papers?

A. Very much like the prior paper. The paper work of the testing and the writing and analyzing the

Weiner 178

MR. STANSKY: Objection.

Q. Did you teach subsequent to 1962 at any place?

A. Yes, I mentioned last time that I did. I taught for a short time, part-time, at the Institute of Practicing Psychotherapy.

Q. That you did, you say, for half a year?

A. Right, one semester.

Q. What did you teach there?

A. This was psychoanalysis and society.

Q. How long did you teach?

A. About half a year.

Q. How many hours a week?

A. this was two hours a week.

Q. Why did you stop teaching?

MR. STANSKY: Objection.

Q. Was it a paid position?

MR. STANSKY: Objection.

Q. You indicated earlier that you had spent a year's of training at the National Psychological Association for Psychological Analysis?

A. Yes.

Q. You said you became an associate member in 1968?

Weiner 180

Q. You indicated that you joined the International Primal Association in 1972. Is that Association still in existence?

A. Yes, it is.

Q. Are you still a member?

A. I do not recall if I sent my dues in. I think I am.

Q. Are you currently, as of 1986, a member of any psychological organizations?

MR. STANSKY: That has been already answered. I object to the question.

Q. What is the nature of the International Primal Association, what do they do?

MR. STANSKY: Objection.

Q. Does it relate to therapeutic technique called primal therapy?

MR. STANSKY: Objection.

Q. Do you know what primal therapy is?

MR. STANSKY: Objection.

Q. Is primal therapy an unconventional therapeutic technique?

MR. STANSKY: Objection.

Q. Do you know what primal therapy is?

MR. STANSKY: Objection.

Weiner 187

MR. STANSKY: Objection.

Q. Have you ever read the code?

MR. STANSKY: Objection.

Q. Does the code prohibit sexual relations with patients?

MR. STANSKY: Objection.

Q. Do you know of anyone who has ever been found guilty of malpractice because of having physical relations with a patient?

MR. STANSKY: Objection.

Q. Do you know of anyone who has ever read the book Fitcracker?

MR. STANSKY: Objection.

Q. During any of the times that you were meeting with Frances was anyone else ever present during those discussions?

Q. No. Only two occasions. The first consultation the mother, Berenice, may have been present, and the one occasion when she asked me to join her and her lawyer for lunch to see if I could be at all useful in the forthcoming trial in Utah. Those were the only two occasions in somebody's presence.

Q. Where did you have lunch with the lawyer?

A. I wish I could remember. It was a damn good

Weiner 190

MR. STANSKY: Objection.

Q. Did you ever say that Frances' mother had anything to do with her problems?

MR. STANSKY: Objection.

Q. You indicated that between 1966 and 1968 you saw Frances at 955 Park Avenue; is that correct?

A. Yes, I did indicate that.

Q. Is that where you maintained your office at that time?

A. Yes.

Q. Will you describe the office that you maintained where you saw Frances.

MR. STANSKY: Objection.

Q. You earlier indicated that between 1961 and 1964 you saw Francis approximately 70 to 80 times at 255 West 88th Street.

A. Yes.

Q. Is that the apartment where you were living at the time?

A. Yes.

Q. Did you see Frances in your apartment?

A. Yes.

Q. When you saw Frances at 955 Park Avenue was that also where you were living at the time?

Weiner 227-229

MR. STANSKY: I mean these are repetitive questions that are just making a big record. I have no objection to these reporters becoming rich, but that's excessive.

THE REFEREE: I think Mr. Callagy should be allowed to pose his question the way he wants. I feel that he's given an introduction which is necessary to frame the question that he's leading up to.

Q. You can answer the question. The question is when you lived at 300 Mercer Street did you live alone at that address?

A. Yes.

Q. During what period of time did you live at that address?

A. 1982 to the present.

Q. At the last session I asked you to search your records to see if you could locate a copy of the speech that you delivered in 1974 at York University in Toronto. Have you done that?

MR. STANSKY: Objection, previously answered.

THE REFEREE: For the sake of my edification, can I have the answer that he

gave last time on that question. I believe the question was --

A. I think I answered that I spoke from notes. I never write out speeches.

Q. My question is, have you searched your records to see if you have the notes from which you spoke?

A. I could not find the notes.

Q. I also asked you if you had a copy of the speech or notes that formed the basis of a presentation you gave at the State University in Buffalo in 1978. Have you done that?

A. Again, I have no copy of the notes.

Q. Have you searched your records to see if you have a copy of the speech or notes covering the presentation you made to the Institute of Practicing Psychotherapists?

A. I could find no notes.

Q. Are you a member of the Jewish faith?

A. Yes.

Q. Do you belong to any synagogue?

A. No.

Q. Have you ever belonged to a synagogue?

A. No.

Q. You previously indicated that at one point you were interviewed for purposes of a radio show. And I ask you if you know why you were interviewed for purposes of that radio show.

MR. STANSKY: I object to the form and content of the question.

MR. CALLAGY: The question was previously posed on page 44 of the transcript.

THE REFEREE: I'm going to allow the question.

A. Could you be more specific. I don't -- refresh my memory "of that radio show."

A. You previously testified on page 44 of the transcript that you submitted to an interview that was aired on radio. And you also testified that that program concerned psychology. And my question was, why was it that you were interviewed as opposed to someone else.

A. I don't remember answering that question or even being asked that question. But I think this may be referring to my being interviewed in connection with depression.

Q. Were you recognized as an expert on that subject?

Weiner 258

deposition regarding the testimony he gave.

MR. CALLAGY: On direct.

THE REFEREE: It does not refer to direct or cross, it just says "I did give testimony." You can take it from there.

MR. STANSKY: When we were before Judge Grossman and that question came up, he suggested to Mr. Callagy, or his representative then, that he'd get the transcript of the testimony. It's available in the court. And surely if his consent is necessary to get that testimony we'll give it.

THE REFEREE: All right, but the question right now is what his recollection is as to the testimony he gave. If he doesn't recall he doesn't recall. That's all.

Q. Can you answer that, doctor?

A. Could you repeat the question?

Q. Do you recall the substance of the testimony that you gave at custody trial that is referred to on Exhibit A?

A. It is as I had testified here recently -- before, formerly, that I considered Frances Schreuder a fit mother for the custody of her children.

Weiner 260

have the same question put to this witness?

THE REFEREE: Mr. Stansky, he's entitled to try to refresh or try to further develop the initial question.

A. I can't remember anything definitive, clear and beyond what I have told you.

Q. Going back to the next reference to your notes which relate to the period 1966 to '68. There's a reference to 1022 Park Avenue.

What does that refer to?

A. That was my office in that period?

Q. And you also note "unpaid balance at 3,000." What does that refer to?

A. To an unpaid balance of Frances' sessions.

Q. And at that point how much were you charging Frances a session?

A. At which point? 66 to 68? Oh, may have been \$50, \$60 a session. Probably 50.

Q. There is also a reference in item 2, and it says, "Berenice, 1968 letter of thanks for extended credit to F." What does that refer to?

A. Precisely what it says.

MR. STANSKY: That was already

Weiner 262

Q. So that between '68 and '71 you were still owed money from the visits that you had had in '66 to '68?

A. Yes.

Q. And you go on in the memo and you say "1973 FS several weeks." And then under that it says, "Lavinia is infant."

To what does that refer?

A. Her daughter, Lavinia, whom she brought to the session.

Q. And then the next item says that you went to Canada for the years '73 to '81?

A. '73 to '81.

Q. And then would you tell me what the final reference is?

A. FS seen August 2nd, 1982 to July 1st, 1983. 59 sessions at \$100 per session. Utah trial, September '83, unpaid balance to be paid by the law firm.

Q. What law firm was that that was going to pay the balance?

A. This is -- I can't remember the exact name. Bolin something, Roy Cohn's office.

Q. Do you know how much was due that Roy Cohn's office was going to pay?

Weiner 265-267

MR. STANSKY: I object to the question as it involves an effort to get testimony or to get information which is privileged

so far as the patient goes and can be waived only by the patient.

Q. Do you claim that the reference in the book --

MR. STANSKY: Wait. There's been no ruling on the question.

MR. CALLAGY: Let me ask the next question and maybe there will a ruling on both.

THE REFEREE: Go ahead.

Q. Do you claim that the reference in the book that you allegedly encouraged Frances to stand up to her overprotective mother is false?

MR. STANSKY: Object to the question.

Q. Is that reference that I have just read to you, does it in any way form a part of the claim for defamation you have asserted in this case?

MR. STANSKY: I object to the question on the ground that the complaint has nothing to do with that particular

statement; that it had to be included to make an understandable excerpt. It was the other items in this statement.

Does the referee want to see it?

THE REFEREE: The statement in the book seems to be a representation by the author, not by Dr. Weiner.

MR. CALLAGY: Well, the point is they have conceded that they are not making a claim based on that statement, so I'll drop it.

THE REFEREE: Okay.

Q. Do you recall approximately how much you weighed in 1966?

A. About 165.

Q. Would that be the same in 1968?

A. Yes.

Q. Have you ever been sued for malpractice?

A. No.

Q. Did you ever go out with Frances on a social basis?

A. No.

Q. Did you ever have dinner in her apartment?

A. No.

Q. Did she ever go to your apartment for dinner?

A. No.

Q. Did you confer with Frances' lawyer regarding possible testimony that you might give in Frances' murder trial?

A. Yes.

MR. STANSKY: I object to the question. I object to the question as an effort to get the contents of the communication.

THE REFEREE: Mr. Stansky, he's not asked for the contents; he's just asked whether he had the conversation.

MR. STANSKY: He already testified that he had.

THE WITNESS: I did. Yes.

MR. STANSKY: I mean it's a repetition of --

Q. Would you relate to me the substance of what you told the attorneys?

MR. STANSKY: I object to that.

THE REFEREE: Sustained. Sustain that objection.

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A. I doubt that very much.

Q. At the time you testified before Judge Waltemade did you testify from any records?

A. No.

Q. Were you paid for the testimony that you gave in the custody proceeding?

MR. STANSKY: I object to the form of the question. I think it's insulting.

THE REFEREE: I direct him to answer.

A. No, I wasn't paid for the testimony.

Q. Did you treat it as a consultation?

A. No.

Q. Did you receive any compensation for the time that you spent?

A. For my time, yes.

Q. Do you recall how much you received?

A. Nominal. Nominal fee. I don't remember.

THE WITNESS: Didn't I answer those already?

MR. STANSKY: Of course you did.

Q. I previously asked you, in view of the fact that this is a defamation action and you are claiming that your reputation has been damaged, I have

Weiner 297

THE REFEREE: At the Institute of?

A. "Of Practicing Psychotherapists," or "For Practicing."

Q. Instead of 1962 the year should have been '82?

A. '82.

Q. My question, then, is with, that new information, or corrected information, why did you leave?

A. Again, I was loath to give up an evening a week at that point to teach.

Q. Are you currently a member of any organization dealing with psychotherapy?

A. American Psychological Association, New York Society of Clinical Psychologists.

Q. Have you been a member of the International Primal Association?

A. Yes, I had been.

Q. Are you currently?

A. No.

Q. When were you a member of that organization?

A. 9172 probably through 1979.

Q. Does that organization concern itself

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with a therapeutic technique known as primal therapy?

A. Roughly.

Q. Do you know what primal therapy is?

A. I hope so.

Q. Is primal therapy an unconventional therapeutic technique?

A. No.

MR. STANSKY: I object to the form of the question --

Q. What is primal therapy?

MR. STANSKY: -- as calling for a conclusion rather than for a fact.

A. Primal therapy is a new name for --

MR. STANSKY: Please, there's another question coming.

Q. What is primal therapy?

A. Primal therapy is cathartic therapy, as Freud practiced it years ago.

Q. You also indicated that you had prepared one or more workshops at the International Primal Association, do you recall that?

A. Yes.

Q. Do you recall when you gave those workshops?

MR. KAGEL: I think that's been testified to.

A. I think that may have been in 1982 or perhaps before. I'm not sure if I was in New York or came from Canada to give a workshop on male psychology.

Q. Did those workshops concern the concept of group dynamics?

A. Well, every workshop eventually involves group dynamics.

Q. Do they involve physical contact with group members?

A. Sometimes. There may be directed physical contact or undirected physical contact between participants.

Q. You previously indicated that two or three of your articles were published in a journal called Primal Community. And this is a reference on page 183 of the transcript.

Do you know what is Primal Community?

A. It's the name of a journal the Primal Organization puts out.

Q. Who are the readers of that journal?

MR. STANSKY: I object to the question.

THE REFEREE: Overruled.

A. The members of the Primal Organization, essentially therapists.

Q. Do you know how large a membership they have?

A. At this point, I have no idea.

Q. Did you know then?

A. Maybe a couple of hundred. Maybe 100.

Q. You mentioned at page 185 that you had appeared on television with your wife, Marsha.

A. Yes.

Q. Were you and your wife the sole participants at that time on that television show?

A. Yes.

Q. In your practice, have you ever carried what's known as a malpractice policy?

A. Always.

Q. Have you ever had a claim filed that you reported to your carrier?

A. Never.

Q. Has a claim ever been made against you, be it in writing or orally, relating to unprofessional practices?

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witness has and what period it covers.

A. Yes.

Q. And what period of time do those records cover?

A. From 1982 to '83, the last period when I saw her.

Q. And that's the only documentation you have relating to that person?

A. Yes.

(Discussion off the record.)

MR. CALLAGY: Can I see A-1 which is marked?

THE WITNESS: Here.

MR. CALLAGY: Since it was marked maybe what we ought to do is at least photo it and then you can have this back.

MR. STANSKY: It's the same thing; you photostated the other one.

THE WITNESS: Check whether they're identical or not, except for the back.

Is that correct?

MR. CALLAGY: There is some handwriting on it. Some notes. But we'll just photo it and give you back the original.
So

DEFENDANT'S EXHIBIT -
BERENICE'S LETTER to Dr. Weiner

Thurs. Jan. 18th, 1968

Dear Dr. Winer:

I appreciated your reply to my letter so very much. I did not know that Frances had been seeing you all this time. Your extreme kindness and interest in helping her all this time without remuneration moves me to deep gratitude. Of course it is impossible for us to pay this staggering amount at this time but I hope some time in the future we can compensate you for your time spent with her.

Constantly relatives and friends are asking me about Frances. I try to say as little as possible because it is just a repeat of trouble that goes on and on and they really don't to hear our troubles it is just curoosity. Invariably they

say: "Why does she stay in N.Y.?" I am asked this question so often with no logical reply to give them which brings embarrassment and frustrations to my already agonizing concern.

In my own inadequate way I have tried desperately to solve some of our solutions but in desperation I went to see a local psychiatrist this week. There is one common decision among all of us and that is Frances must get out of N.Y. She is trying to live in grandeur, with no income, in the most expensive city in U.S. This is plain nonsense. Naturally everyone wants the best living conditions and the best for our children but when one does not have the income to "live high" they gear their living to fit their income. Frances is not facing reality and according to Dr. Darke, my psychiatrist, she never will until extreme measures are

taken to force her. Dr/ Darke took his medical training in N.Y. and he said he lived in Long Island with a wife and two children in a very nice apartment with doorman for \$90 a month (I would guess this was 20 years ago). But considering rents have doubled in that time Frances can and must move out of that \$335.00 a month apartment. Dr. Darke's recommendation is that I stop paying her rent (which I'm forced to do anyway because of lack of money), let the apartment evict her and the State Welfare take over. He suggests she go to the State Welfare, division for deserted mothers and dependent children. He says they can do much for her such as try to locate and contact the father and try to get support for this family. We can not go on bearing the financial burden with this expensive apartment, private schools and mounting living costs. We have dished out thousands of dollars to

this family in the last five years but it cannot go on.

We have pleaded and pleaded with Frances to do something about her high living conditions but she will not budge. The fact she has been seeing you all these months and years without paying is a sign of irresponsibility. Dr. Darke says she will not face reality until she is forced to which means this terrible agonizing approach of plain eviction and welfare commitments. As Dr. Darke says she is not going to like this because she wants to live in grandeur and so far has gotten away with it by going along relying on our (mostly my) generosity and assumption that "I will not let her down". She is constantly making promises of looking for work, but the drawback here is her two small children. With no one in the home to look after them when they return from

school or sick no employer wants to take a chance on her too frequent absence. Her promises and excuses are a front and a prolinging to live in this grandeur world of her.

What to do? How can we force this young woman to see reality to move into self-discipline. Here is where the tragedy lies. When she was thrown out of college a psychiatrist here recommended : "We put our hands behind us and let her go to jail". This makes two psychiatrists who have suggested this is a behavior personality which should be dealt with by force, while we look the other way.

As a mother who deeply loves this girl and her children I cannot bring myself to the agony and suffering these drastic steps would bring on all of _____. But after years of trying to use persuasion what other course is there?

This whole mess is a tragedy from start to finish and my heart crys out to this young woman who so desperately needs help, love and understanding. But how, what when? This desire for a rich life is her "illness". We have offerred her everything at this end which could accommodate them at very little expense to us. She need not stay here forever but it could be a stepping stone to more desirable things in the future.

I would like to come to N.Y. and contact those .who might help us prevent tragedy. Neither Dr. Darke or my husband think I should go to N.Y. but my deep love for this family is stronger than opposition and I may just go any way. The many times I have gone there I have come away without accomplishing a thing I cannot do anything with her as far as reasoning goes but I feel I could set up some kind of

help for her in case of desperation she could turn to for help.

Again I thank you for all your kindness and consideration of my daughter and her children. They are part of me and I love them dearly. This whole mess is litterly killing me off by inches I have and am suffering so much every ounce of me feels sick,

Sincerely.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X

HERMAN WEINER,

Plaintiff,

-against-

DOUBLEDAY & COMPANY, INC. and
SHANA ALEXANDER,

Defendants.

-----X

Index No. 29527/85

AFFIDAVIT IN OPPOSITION TO
PLAINTIFF'S MOTION AND IN
SUPPORT OF DEFENDANTS'
CROSS-MOTION FOR SUMMARY JUDGMENT

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

MARK A. FOWLER, being duly sworn,
deposes and says:

1. I am a member of the Bar of the
State of New York and am association with
the firm of Satterlee, Stephens, Burke &
Burke. I make this affidavit solely for

the purpose of submitting to the Court certain pages from the transcript of plaintiff's deposition that are relevant to plaintiff's motion and defendants' cross-motion for summary judgment.

2. Attached hereto as Exhibit "A" are pages 271--73 of the continued deposition of Herman Weiner dated January 16, 1987, in which he unequivocally waived any claim to damages for loss of income.

/S/
MARK A. FOWLER

Sworn to before me this
30th day of November, 1987.

/S/
DAVID G. CURRAN
NOTARY PUBLIC, State of New York
No. 41-4898239
Qualified in Queens County
Commission Expires May 18, 1989

Weiner 271-273

Q. Dr. Weiner --

MR. STANSKY: Just a moment.

Q. Dr. Weiner, am I to understand based on what you have previously stated and what your counsel has stated here today that in this case you are not making any claim for any lost income, lost compensation, by reason of any of the statements that you object to in the book?

MR. STANSKY: I object to the form of the question. The witness cannot say what Mr. Callagy understood or doesn't understand now. And that's the way he couches his question.

Q. Are you making any claim in this lawsuit for any lost income, lost earnings, lost compensation?

MR. STANSKY: The plaintiff has testified and the record will show, and his attorney is now speaking to the effect that we have stipulated that there is no

claim for lost income resulting from liable.

Q. When you say "lost income," do I understand that you are including in this to the extent that you may be self-employed or to the extent that the compensation you received from your practice in one year may vary from the next, that you are not making any claim for any losses from your practice as a psychologist?

MR. KAGEL: Read the question again.

MR. STANSKY: Go ahead. Answer it.

A. Yes. I go along with what my lawyer stipulated in that regard. That there was no -- that I'm not making a claim for loss of income from my practice due to the libel in the book.

Q. And you are not making a claim for any loss of money from anything unrelated to your practice?

MR. STANSKY: I object.

THE REFEREE: Mr. Callagy, I think we're going far afield here. I think this just relates to his compensation.

Q. I'm sorry. You are not making a claim for any loss of income --

THE REFEREE: Loss of income. We've clarified that.

MR. CALLAGY: Of any nature whatsoever.

MR. STANSKY: He's already answer that had over and over again. And if you don't have your file and don't know there was a stipulation to that effect that's not his fault.

Q. Just if you would answer that last question.

MR. STANSKY: But he's already answered. I hate to take it up everyone's with such nonsense.

THE REFEREE: He's answered the question. He's made it very clear. Off the record.

(Discussion off the record.)

(Short recess.)

Q. Dr. Weiner, are you making any claim in this action for any physical illness by reason of the statements?

A. No.

Q. Are you making any claim for any mental illness by reason of the statements?

A. No.

Q. Are you making any claim for emotional disturbance by reason of these statements?

A. I wish I could.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X

HERMAN WEINER,

Plaintiff,

-against-

DOUBLEDAY & COMPANY, INC. and
SHANA ALEXANDER,

Defendants.

-----X

Index No.: 29527/85

SUR REPLY AFFIDAVIT

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

LYMAN STANSKY, being duly sworn,
deposes and says:

I am the attorney for plaintiff and
submit this affidavit to point out mis-
statements of fact and law contained in
defendants Reply Memorandum.

Appended as Exhibit A is a copy of the libel.

Appended as Exhibit B are pages 134, 135, 143-153 of plaintiff's July 9, 1986 deposition, hereinafter referred to.

The pages of that deposition effectively demolish defendants' claim that plaintiff has not presented or cannot present evidence of damage to reputation, or the humiliation and ridicule suffered at the hands of friends, colleagues and other professionals and from the patient in treatment from whom he first learned of the libel (pgs. 134, 135), resulting from the sale of about 100,000 hardcover copies of NUTCRACKER. Thus defendants' claim (Point IV D's Reply Memo) asserting that plaintiff has submitted no evidence of damage to reputation to exacerbated feelings, is without bases in fact.

Defendants' use of MORAN v. HEART CORP, 40 NY 2nd 1071 (1976) (p.13, D's Reply Memo) is misleading. Defendants' quotation is not the law of the case but a selected part of the opinion of the two concurring justices. The majority opinion states the law of the case, and includes a pointed caution against the very part excerpted by defendants.

Significant is the fact that six months after MORAN, the same court, in Rinaldi v. Holt Reinhart, 2 Med. L. Rptr. 2169 (July 14, 1977) emphasized defendants' misplaced and misleading reliance on MORAN, in the following language, pertinent to the case at bar:

"To begin with we have no doubt that the complaint states a good cause of action for libel per se and that there was no need for plaintiff to allege special damage. Any written or printed article is libelous or actionable without alleging special damages if it tends to expose the plaintiff to public contempt, ridicule, aversion or

disgrace or induce an evil opinion of him in the minds of right-thinking persons and to deprive him of their friendly intercourse in society"
(citations omitted)

To equate the plaintiff's unequivocal and specific denials, in his affidavit in support of this motion and in his lengthy depositions, of any sexual intimacy with his patient (Point II, p. 11 D's Reply Memo) with the failure of the plaintiff RINALDI to state facts in contradiction of the defamatory facts specified to defendants, and to demonstrate their falsity, is misleading. At bar, defendants alleged no facts. Only plaintiff states facts in his denials.

Since there are no facts presented by defendants in support of their repetition of defamatory statements of others, plaintiff could not address herself to any such facts, with the result that there are no material triable issues of fact. Since

there are none, plaintiff is entitled to judgment as a matter of law.

/S/
LYMAN STANSKY

Sworn to before me this
3rd day of November, 1987.
THOMAS KENDRICKS
Notary Public, State of New York
No. 31-4844847
Qualified in New York County
Commission Expires May 31, 19..

Weiner 143-145

Q By the way, whose party was it that you were attending?

A You want the names?

Q Right.

A This was the anniversary of Phyllis and Ronald Katz.

Q Do they live here in New York City?

A They have a home in New York City.

Q They were friends of yours, the Katz'?

A Yes.

Q Did you attend the party with anyone?

A No.

Q What, if anything, on this occasion did Mr. Oppenheimer say to you?

A I can't recall the precise statement, but it was--it had to do with what kind of therapist are you to teach people

how to murder their father. That was said in jest, but it was still upsetting.

Q Was he smiling?

A That was only part of it.

Q Was he laughing when he said it?

MR. STANSKY: Will the witness be allowed to finish his answers?

MR. CALLAGY: I will ask him questions and let him respond.

MR. STANSKY: You will let him finish the answer without interruption.

MR. CALLAGY: I did not ask him to volunteer. I will ask him the question.

MR. STANSKY: He is not volunteering. You asked him what he said and he did not complete his answer.

Q Was he laughing when he said that to you?

MR. STANSKY: I object to that question.

Q You said that he said it in jest. Was he smiling when he said it?

A He was smiling, of course. It was still very humiliating to be accused even in jest of forming parenticide in one hand and of being involved in so-called hanky-panky, as the book describes.

Q Did he say that you were involved in hanky-panky?

A Something to that effect. I don't think he believed it, but still he couldn't resist ribbing me about it and I found it humiliating.

Q Was this the first person who had ribbed you about it?

A I don't know if he was the first person. There were other people who had ribbed me about it.

Q Do you know if any person who had ribbed you about this was prior to the ribbing that you took from Mr. Oppenheimer?

A There were other colleagues.

Q I am talking prior to the ribbing that you took from Martin Oppenheimer.

A Yes, prior.

Q Who, if anyone, ribbed you about this prior to Martin Oppenheimer?

A Doctors. Dr. Plosky. He thought it was all very, very funny and he wondered out loud if he could possibly refer patients to me since they may read the book and wonder who the heck he is referring them to.

Q Where does Dr. Plosky practice?

A He practices in Manhattan.

Q What kind of doctor is he?

A A doctor in philosophy, Ph.D.

Q You said that he was ribbing you?

A Right.

Q Where did he rib you?

A Where?

MR. STANSKY: In the ribs.

Weiner 147-153

Q How many patients has he referred to you?

A This goes back quite a few years.

Q When is the first time?

A I had been away in Canada for about nine years, so there weren't many opportunities for him to refer at that point, but he had in the past referred patients to me.

Q Prior to the time that you went to Canada did he refer patients to you?

A Yes.

Q How many patients?

A I don't recall.

Q More than two?

A I think so.

Q More than four?

A I would say more than two. I would have to really stop and try to remember.

Q He never referred patients to you when you were in Canada?

A No, not while I was in Canada.

Q When you came back from Canada he never referred a patient to you?

A Right.

Q During what period were you in Canada?

A '73 to 1981.

Q Do you know when it was that Dr. Plosky ribbed you about this?

A I would guess about eight months ago.

Q Did you tell Dr. Plosky that you were sueing the publisher?

A He recommended that I do sue the publisher and he said, well--I have consulted attorneys.

Q At the time you had this conversation with Dr. Plosky was there a lawsuit pending?

A I don't recall if the suit was pending but I had been discussing it with attorneys.

Q Did you tell Dr. Plosky that you had been discussing it with lawyers?

A Yes.

Q Did you tell Dr. Plosky that the reference to you was not true?

MR. STANSKY: I object to the question.

Q Did Dr. Plosky when he was ribbing you say that he believed what was said about you in the book?

A Obviously not.

Q Did he say that he did not?

A He obviously didn't believe it, but he could not help to feel that it was very funny and also was very destructive to see me painted in such ludicrous and damaging lies.

Q By the way, how long did this conversation with Dr. Plosky last?

A I can't remember the time.

Q Was anyone present during the course of the conversation?

A Just Dr. Plosky and I.

Q Do you know where the conversation took place?

A I don't recall. Maybe in some restaurants. Maybe in my office. I don't know.

Q Under what circumstances would Dr. Plosky be in your office?

A He was coming down to meet with me on a social occasion to have dinner with me and he would be in my office probably or I would be in his office.

Q How often during 1986 have you seen Dr. Plosky?

A During 1986 I have seen him a number of times.

Q When was the last time you saw him?

A Two weeks ago.

Q Is it fair to say that you saw him about once a month during 1986?

A At least once a month.

Q Would you describe what you do when you see him?

A We talk, we play tennis. What else is there?

Q Where do you play tennis?

A He has a tennis court.

Q At his house?

A Yes.

Q Where is his house?

A In Bronxville.

Q Do you have a regular game with him?

MR. STANSKY: I object to the question.

A What is a regular game?

Q Is Dr. Plosky a friend of yours?

MR. STANSKY: Objection.

Q In addition to playing tennis with Dr. Plosky and having dinner with him have you socialized at his home in 1976?

A I would say so.

Q Has he socialized at your home?

A Yes.

Q Did Dr. Plosky ever say to you in words or substance that he did not want to associate with you because of anything that was said about you in the book?

A No.

Q Did Dr. Plosky ever say to you in words or substance that he did not want to be your friend because of anything said about you in the book?

A No.

Q Is Dr. Plosky a medical doctor?

A No, he is a Doctor of Psychology.

Q Have you referred any patients to Dr. Plosky?

A Not since I am back in New York, no. I don't think so.

Q Since 1981 you have not referred any patients to him?

A Right.

Q While you were in Toronto you did not refer any patients to him?

A No.

Q Prior to going to Toronto, which would be in 1973, did you refer any patients to him?

A I think there was some mutually referring in that period prior to 1973.

Q In addition to Dr. Plosky did anyone either face to face or on the telephone make a reference to you about the mention of you in the book? I am talking about prior to the time that you discussed it with Martin Oppenheimer, which would be March of 1986.

A Yes, it was Dr. Langer, he is an M.D.

Q Where does Dr. Langer maintain his practice?

A In Manhattan.

Q What kind of doctor is he?

A He is a psychiatrist.

Q Is he a friend of yours?

A Sort of.

Q When did you first become friendly with Dr. Langer?

A I met him shortly after I returned to Manhattan in 1981.

Q Has he ever referred any patients to you?

A I believe he has.

Q When did he first refer a patient to you?

A I believe he has.

Q When did he first refer a patient to you?

A Maybe three years ago, four years ago. I am sorry.

Q How many patients has he referred to you since 1981?

A Maybe two patients.

Q Have you ever referred any patients to him?

A Yes.

Q How many?

A Two or three.

Q Did you ever refer any patients to him prior to 1981?

A No, I was not in Manhattan then.

Q When was the last time that you referred a patient to him?

A A little more than a year ago, perhaps.

Q Do you know who you referred to him?

A Yes, I do.

Q What is the name of that person?

MR. STANSKY: What is the question?
The name of what person?

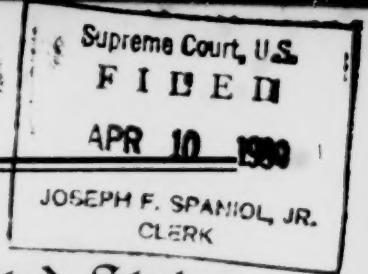
Q Can you be precise as to when you last referred a patient to Dr. Langer?

A I couldn't be more precise than to say it was more than a year ago.

Q You have indicated that since you came back to Canada in 1981 Dr. Langer has referred to you two patients. When was the last time he referred a patient to you?

A Perhaps two years ago.

No. 89-1420



IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

HERMAN WEINER,

Petitioner,

vs.

DOUBLEDAY & COMPANY, INC.
and SHANA ALEXANDER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENTS IN OPPOSITION

LAURA R. HANDMAN, ESQ.
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Publishing Group, Inc.
PAMELA M. PARKER, ESQ.

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Question Presented

Whether this Court has certiorari jurisdiction to review the decision of the Court of Appeals of the State of New York, granting Respondents summary judgment in this libel action on the ground that, as a matter of New York state law, no genuine, triable issue was raised as to whether Respondents had acted in a grossly irresponsible manner in publishing certain statements about Petitioner, where (1) the Court of Appeals' decision rested on an adequate and independent state ground and does not implicate any substantial federal question and (2) Petitioner's newly fashioned "due process" claim is wholly meritless, was never raised below and no state court ever passed upon this issue.

Listing Pursuant to Rule 28.1

The parent companies of Bantam, Doubleday, Dell Publishing Group, Inc., the successor to Doubleday & Company, Inc., are Bertelsmann Publishing Group, Inc., Bertlesmann, Inc. and Bertelsmann A.G. There are no subsidiaries of Bantam, Doubleday, Dell Publishing Group, Inc.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

No. 89-1420

HERMAN WEINER,

Petitioner,

v.

DOUBLEDAY & COMPANY, INC.
and SHANA ALEXANDER,

Respondents.

ON PETITION FOR A WRIT OF
CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENTS IN OPPOSITION

COUNTER-STATEMENT OF THE CASE

A. Preliminary Statement

This is a libel action brought by
Petitioner Herman Weiner, a psychologist,
against the experienced author and

journalist, Shana Alexander ("Alexander") and Doubleday & Company, Inc.

("Doubleday"), in connection with a book written and published, respectively, by Respondents, entitled Nutcracker (hereafter "Nutcracker" or the "Book").

The New York Court of Appeals, on appeal by Petitioner from the Appellate Division, First Department, affirmed the Appellate Division's award of summary judgment in favor of Respondents, on the sole ground that Petitioner had failed to come forward with evidence sufficient to raise a triable issue whether Respondents had been grossly irresponsible in publishing certain statements made about Petitioner in the Book. Because the Court of Appeals' decision rested entirely on adequate and independent state law grounds, there is no issue of federal law that properly may be

considered by this Court. The standard of gross irresponsibility is part of the substantive state law of defamation applicable in New York to actions brought by a private figure arising out of a publication involving a matter of legitimate public concern. The standard reflects New York's decision to protect speech involving matters of public concern above the minimum standard of fault which the federal Constitution requires a private defamation plaintiff to prove.

Determination of which state standard of fault is applicable and the application of that standard to the facts of the case both involve the interpretation of state law only, as the Court of Appeals' opinion -- and several of this Court's decisions -- make clear. These state law questions do not become, as Petitioner

argues, federal questions simply because New York law limits the requirement of a showing of gross irresponsibility to speech involving matters of public concern and, coincidentally, various federal constitutional requirements are also triggered when such public speech is involved.

Nor can Petitioner create some abridgement of a federal right or "liberty" interest out of nothing more than the fact that he lost his libel action. This strained effort to come within the jurisdictional prerequisites of 28 U.S.C. §1257(a) is without merit, particularly since the interest he claims was abridged -- his reputation -- is protected under state law and not the federal Constitution. Moreover these claims were never raised or passed upon in any of the state courts below.

Therefore, this issue cannot be properly raised for the first time in the Petition for a Writ of Certiorari.

B. The Book

In the Book, Alexander reported on the family turmoil surrounding the widely publicized murder of the Mormon multi-millionaire Franklin Bradshaw by his grandson, Marc Schreuder, who carried out the murder at the instigation of his mother (Bradshaw's daughter), Frances Schreuder. The Book, subtitled Money, Madness, Murder: A Family Album, explores the tragic family history that led to the killing and convictions of Marc and Frances Schreuder (A-129).*

Alexander, with forty years of experience as a journalist, commentator,

* References are to the Appendix attached to the Petition before this Court.

editor and author, and numerous professional awards to her credit, assisted by an experienced investigative reporter, interviewed more than 250 individuals, including Frances Schreuder and all of the surviving members of her family (A-127, 130).

This extensive investigation produced not simply a factual report of the murder of Franklin Bradshaw and the subsequent convictions of his daughter and grandson. Rather, as the subtitle makes clear, the "Family Album" is a psychological portrait of the Bradshaw family, and, as the Court of Appeals found, "the failure of family and professional figures to halt the progression of Schreuder's illness before it resulted in murder" (A-15-16). Nutcracker presents this portrait by following the twisted path of perceptions, misperceptions and outright

delusions of the various family members which, over their years of interaction and reaction, developed into the tragic criminal psychosis presented in the form of a "Family Album" (A-3-4, 43).

Frances Schreuder was Petitioner's patient during the 1960's and in 1982, after she had been indicted for murder (A-169, 173). During an acrimonious divorce proceeding between Frances and her first husband in the mid-1960's, involving the question of custody of their two sons, Petitioner had testified in open court that Frances was a "fit mother" (A-28) -- surely the most controversial of opinions in view of subsequent events, including the conviction of one son for grandpatricide instigated by his mother and the hospitalization of the other for the attempted murder of his roommate.

In the context of describing the bitter views and psychotic relationships of the various family members, Alexander referred to Petitioner in two paragraphs in her 431-page Book. Although additional language in the nature of adverse opinions by members of the family was originally challenged by Petitioner, Petitioner's most recent appeal focused on only two sentences (underscored below) in which Alexander reported on comments regarding Petitioner's relationship with Frances made by four of her intimates. The comments were offered by Richard Behrens (Frances' close friend, confidant and subsequent government witness in Frances' murder trial), Berenice Bradshaw (Frances' mother) and by Marilyn and Robert Reagan (Frances' sister and brother-in-law), and tellingly reflected

their own cynical views about psychiatric care.

In 1966 Frances put herself for two years under the care of a Park Avenue psychiatrist named Herman Weiner, who seems to have encouraged his patient to stand up to her overprotective mother. Berenice was attempting to infantilize her, Frances decided. She told Mark that Granny had a neurotic need for "babies to smother," which could account for Berenice's intense dislike of the man she began to habitually refer to as "Weenie, the big, fat, ugly Jew."

Robert Reagan remembers Dr. Weiner arriving in court to testify for Frances, during the divorce proceedings eccentrically costumed in bright red slacks and a loud plaid jacket. Marilyn Reagan remembers the size of one of his bills: Frances owed her psychiatrist \$3,000. "My understanding was that her problem was inability facing reality," says Marilyn. The huge unpaid bill made her sister think it might be the psychiatrist who had this problem, not his patient. Later, when Behrens claimed that "Frances always slept with her shrinks," the Reagans said they were not at all surprised. They'd suspected "hanky-panky," they confessed. Berenice had said the same. [A-4-5; emphasis added.]

This passage is consistent with the Book's overall methodology, typical of "true crime" works, which offered the reader, as the Court of Appeals found, "[l]argely a pastiche of statements by interviewees who are unendorsed and at times openly disparaged by Alexander herself ..." (A-10).

C. The Decisions Below

On the parties' cross-motions for summary judgment, the trial court not only denied Respondents' motion for summary judgment but made the virtually unprecedented decision of granting Petitioner's motion for summary judgment.

The Appellate Division, First Department, unanimously reversed, concluding, inter alia, that the references to Petitioner were presented as pure opinion and not facts, citing "cautionary passages" throughout the Book

signalling the reader that merely opinion was being offered (A-44-45). In addition, the intermediate appellate court also concluded that the standard of fault of gross irresponsibility adopted as New York law in Chapadeau v. Utica Observer-Dispatch, Inc., 38 N.Y.2d 196, 379 N.Y.S.2d 61, 341 N.E.2d 569 (1975), was applicable because the statements at issue involved matters of public concern and the standard had not been satisfied as to either defendant (A-40, 49).

The Court of Appeals unanimously affirmed the Appellate Division's grant of summary judgment in favor of Respondents, holding that Petitioner "has failed to come forward with evidence sufficient to raise a triable issue of fact as to whether [Respondents] satisfied their duty of care under Chapadeau" (A-16). Applying

well-established New York law of both defamation and summary judgment, the Court of Appeals held that both Alexander, whose "experience and reputation are unquestioned" (A-17), and Doubleday, in reliance thereon, had obtained reasonable confirmation of the statements in question, "given the narrow circle of people whom it would have been productive to question" in this "'carefully locked and guarded household.'" (A-4, 17, 18).

In the course of its review of Respondents' investigation, the Court specifically noted the multiple interviews of Behrens who proved himself knowledgeable about the intimate details of Frances' life both in the interviews and later at trial (A-17-18). The statements from other family members, the Court specifically found, were accurately

reported and generally corroborative (A-18).

As to Petitioner's argument, advanced in this Petition as well, that the subject matter fell outside the sphere of legitimate public concern and, therefore, a simple negligence standard should be applied, the Court disagreed, ruling:

We are unpersuaded by plaintiff's contention that a simple negligence standard should govern. Plaintiff does not dispute that the general subject of "Nutcracker" falls within the Chapadeau guidelines, but argues that the particular topic of his relationship with Frances Schreuder is a detour from legitimate public concern into the realm of mere gossip and prurient interest. This is precisely the sort of line-drawing that, as we have made clear, is best left to the judgment of journalists and editors, which we will not second-guess absent clear abuse (Gaeta v. New York News, [Inc.,] 62 N.Y.2d 340, 349[, 477 N.Y.S.2d 82, 465 N.E.2d 802 (1984)]). "Nutcracker" is, in part, clearly intended as an inquiry into the failure of family and professional figures to halt the progression of Schreuder's illness before it resulted in murder. Her

relationship with plaintiff is not so remote from that subject as to constitute a clear abuse of editorial discretion. [A-15-16.]

REASONS FOR DENYING THE PETITION

I.

THE NEW YORK COURT OF APPEALS'
DECISION RESTED ON AN INDEPENDENT
AND ADEQUATE STATE LAW GROUND
AND PRESENTS NO QUESTION OF
FEDERAL LAW WARRANTING REVIEW

This Court's statutory authorization for accepting cases on certiorari from a state's highest court extends, in relevant part, to those cases "where any title, right, privilege, or immunity is specially set up or claimed under the Constitution ..." 28 U.S.C. §1257(a) (Supp. 1989). The power to review judgments from the highest state court is limited to review of judgments involving federal rights:

Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions.

Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945).

Because the portion of the Court of Appeals' decision from which review is sought rests solely on an adequate and independent state ground, this Court has no jurisdiction to grant the writ of certiorari. Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 566 (1977); Henry v. Mississippi, 379 U.S. 443, 446 (1965). The decision could not have been more plain in finding for Respondents on the state law ground that Petitioner had failed to present a triable issue of fact as to whether Respondents had published the Book in a grossly irresponsible manner. Only the

decision in Respondents' favor on the state law ground is the subject of this Petition.

To avoid the consequences of this unambiguous decision, Petitioner offers a decidedly devious characterization of the Court of Appeals' decision as "crafted to appear as a fact-dependent application of wholly uncontroversial legal standards, and thus not an appropriate candidate for review by this Court," but which cannot "hide the violations of petitioner's constitutional rights" (Petition at 24-25). But casting aspersions on the motives of the seven judges of the New York Court of Appeals cannot suffice to create a federal question when the state law ground was clearly and unequivocally the basis of the decision. Compare Michigan v. Long, 463 U.S. 1032, 1040-41 (1983) (Supreme Court will accept

jurisdiction where basis of state decision is not clear and "fairly appears" to rest primarily on federal law or to be interwoven with federal law).

Both what level of fault is to be applied beyond the constitutionally-mandated minimum and the application of that standard to determine whether a triable issue exists, are strictly matters of state law. The standard of fault applied in this case was that announced by the Court of Appeals in Chapadeau v. Utica Observer-Dispatch, Inc., 38 N.Y.2d at 199, as the law of New York:

[W]here the content of the article is arguably within the sphere of legitimate public concern, which is reasonably related to matters warranting public exposition, the party defamed ... must establish ... that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties.

In adopting the gross irresponsibility standard, the Court of Appeals was acting "within the limits imposed by the Supreme Court" (id.) in express response to this Court's invitation: "[S]o long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974).

The interest in preventing and redressing injury to reputation is primarily a state interest, and it is the states that have the primary responsibility for protecting that interest. Id. at 341, 348 (recognizing "strong and legitimate state interest in compensating private individuals for injury to reputation"). The defamation

remedy is thus a creature of state law. The federal constitutional dimension of libel disputes comes into play only when state tort law conflicts with the protections afforded by the First Amendment.

The Gertz Court found that strict liability for defamation actions, even those brought by private plaintiffs about speech that did not involve matters of public concern, conflicted with the protections afforded by the First Amendment. Id. at 346. It likewise found that the Constitution did not require states to apply the actual malice standard of fault when private plaintiffs bring defamation actions, regardless of whether the speech is about purely private matters or matters of public concern. Instead, states were allowed, but not required, to apply a "less

demanding" standard provided it was not liability without fault. Id. at 347-48. Within these constitutional boundaries, the Gertz Court concluded that the states should retain "substantial latitude in their efforts to enforce legal remedy for defamatory falsehood injurious to the reputation of a private individual." Id. at 345-46.

Exercising that latitude, the New York Court of Appeals adopted the middle ground of gross irresponsibility -- something less than actual malice but more than the constitutional minimum of negligence -- when a private plaintiff brings a defamation action about a publication involving a matter of public concern. Petitioner does not and cannot challenge the constitutionality of the "gross irresponsibility" standard, but rather, merely challenges its application

in this case on the ground that the subject matter here is not "arguably within the sphere of legitimate public concern" (Petition at 26-31). But in so arguing, Petitioner fails to present any issue of federal constitutional law warranting review by this Court.

The mere fact that New York law looks to whether the report involves a matter of legitimate public concern as the triggering mechanism for the application of its higher standard of fault and that, coincidentally, various constitutional burdens have been held by this Court to be triggered by a similar finding, does not federalize New York's standard. Since New York, free of any constitutional constraint, may adopt a rule making gross irresponsibility or any other standard of fault applicable even when the subject is not a matter of

public concern, a fortiori, its decision that the subject in this case was within the scope of legitimate public concern and thus the gross irresponsibility standard applied, is of no constitutional moment.

This situation is thus in contrast to those cited by Petitioner where constitutional burdens on the libel plaintiff are triggered by whether the subject is a matter of legitimate public concern. In Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985), relied on by Petitioner (Petition at 24, 30-31), a plurality of this Court concluded, as the Gertz Court had previously, that the Constitution required a finding of actual malice before presumed or punitive damages could be awarded to a private plaintiff when the subject was a matter of legitimate

public concern. That constitutional requirement did not apply to purely private defamation actions, where no issue of public concern was reported. Id. at 761. Since the constitutional requirement turned on this finding, the Court reviewed the state court's determination that the credit report at issue did not involve an issue of public concern and that a verdict against the defendant was thus properly based on the lower standard of fault. Id. at 762.

Similarly, in Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986), also relied on by Petitioner (Petition at 23), this Court held that when articles involving matters of public concern are at issue, the burden of proving falsity shifts to the plaintiff, even when he is not a public official or public figure. This modification of the

common law rule was mandated by the First Amendment. Id. at 776.

The fact that New York has elected to impose a higher standard of fault for liability if the speech involves a matter of public concern, only demonstrates that New York's law is consistent with the trend of these decisions to give greater protection to speech involving matters of public concern in recognition that "speech of public concern is at the core of the First Amendment's protections." Id. at 778 (citing Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. at 758-759).

In this case, however, the Court of Appeals, in giving broad scope to what state law deems to be a matter of public concern, looked to its own precedent -- Gaeta v. New York News, Inc., 62 N.Y.2d

340 -- not to federal law (A-15). Thus, Petitioner's claim that this Court has jurisdiction on the ground that the Court of Appeals misconstrued federal precedent in reaching its decision (Petition at 26-28) is simply not accurate since state law was the only source cited as authority. Compare California ex rel. Cooper v. Mitchell Bros.' Santa Ana Theater, 454 U.S. 90, 92 n.5 (1981) (federal basis for decision found where Supreme Court precedent but no state authority was cited).

The precedent with which Petitioner apparently takes issue, espoused by the Court of Appeals in this case and in Gaeta, looks to the "judgment and discretion" of editors and journalists in defining what is a matter of public concern.

Determining what editorial content is of legitimate public interest and concern is a function for editors. ... [E]ditorial judgments as to news content will not be second-guessed so long as they are sustainable.

Gaeta v. New York News, Inc., 62 N.Y.2d at 349. That deference, adopted as a matter of state law, is, contrary to Petitioner's contention (Petition at 29-30), also wholly consistent with this Court's refusal to intervene in matters involving editorial selection of what is and is not worthy of publication. See Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 255-56 (1974) (rejecting a law that required newspapers to publish a reply by a political candidate).

In any event, the application of the state law standard to the facts of the case before the Court of Appeals is clearly binding on and not reviewable by this Court. See, e.g., Williams v.

Kaiser, 323 U.S. 471, 473 (1945); Smith v. O'Grady, 312 U.S. 329, 330 (1941).

In this case, the Court of Appeals applied New York defamation law to conclude that the reporting in the Book on Petitioner's relationship with his former patient was a matter of public concern, specifically finding that the relationship was "not so remote" from the "inquiry into the failure of family and professional figures to halt the progression of Schreuder's illness before it resulted in murder" (A-15-16). That finding seems particularly compelling in light of Petitioner's pronouncement of Frances Schreuder as a fit mother (A-28) and the tragic events that followed.

The Court then applied New York's summary judgment rules and New York's higher fault standard of gross irresponsibility to find that Petitioner

"has failed to come forward with evidence sufficient to raise a triable issue of fact as to whether defendants satisfied their duty of care under Chapadeau"

(A-16). In reaching this conclusion, the Court of Appeals closely and carefully reviewed the extensive investigation by Alexander and concluded that she had accurately reported the comments of those in "the narrow circle of people whom it would have been productive to question" (A-17-18): family members and Frances' closest confidant, Richard Behrens, whose credibility and knowledge of Frances was established in multiple interviews and at Frances' trial.* These are classic determinations of state law as applied to

* While the Court of Appeals did not specifically discuss whether Alexander should have questioned Frances Schreuder or Petitioner, as

specific facts that this Court does not review.*

(continued from previous page)

Petitioner has urged (A-38-39), the Appellate Division did conclude that, given the psychologist/patient privilege, Respondents "had no reason to anticipate [Petitioner] would discuss the details of his relationship with Ms. Schreuder with them" (A-43).

- * This decision in the media defendants' favor based solely on the application of state law is in sharp contrast to those instances, relied on by Petitioner (Petition at 27-28, 34-35), where this Court has reviewed the application of the constitutional standard of fault of actual malice by lower courts when the result below was against the media defendant. E.g., Harte-Hanks Communications Inc. v. Connaughton, ___ U.S. ___, 109 S.Ct. 2678 (1989) (review of a decision by a federal jury and an affirmance by a federal appeals court that the media defendant had published with constitutionally required standard of fault of actual malice); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) (review of decision by a federal appeals court, interpreting and applying Rule 56 of the Federal Rules of Civil Procedure

(continued)

II.

**PETITIONER'S "DUE PROCESS"
ARGUMENT, IN ADDITION TO LACKING ANY
FOUNDATION IN LAW, WAS NEITHER RAISED
IN NOR PASSED UPON BY ANY COURT BELOW**

The notion -- not at all explained or
justified in the Petition -- that
Petitioner has a constitutionally

(continued from previous page)

which denied summary judgment to
media defendants on the ground that a
jury could find constitutional actual
malice).

In each instance, the question before
the Court was whether the unsuccessful
media defendant's rights under the
First Amendment had been abridged by
the finding that the constitutional
standard of fault had been met. See
also Time Inc. v. Firestone, 424 U.S.
448 (1976) (review of state court
verdict against media defendant,
affirming that successful libel
plaintiff was not a public figure
and, therefore, burden of proving
constitutional standard of actual
malice not required); Gertz v. Robert
Welch, Inc., 418 U.S. 323 (review of
federal court determination in media
defendant's favor, reversing finding
that private figure libel plaintiff
had burden imposed by Constitution of
proving actual malice).

cognizable "liberty" interest in recovering for "reputational injury in his profession", which theoretically was abridged in violation of the due process clause when the Court of Appeals ruled against him, is purely a figment of Petitioner's legal imagination, concocted at this late stage solely to provide a federal question for review by this Court.

Quite simply, the argument has no apparent foundation in fact or in law. Certainly, Petitioner has failed to cite any authority for the proposition that the right to recover for alleged reputational injury is a "liberty" interest in itself protected under the due process clause.

As discussed above under Point I, the interest in protecting the reputation of individuals derives not from the federal Constitution, but is a "strong and

legitimate state interest." Gertz v. Robert Welch, Inc., 418 U.S. at 348. The federal interest intercedes only by way of a privilege derived from the First Amendment that protects the publisher of speech and "delimits a State's power to award damages" in libel actions. New York Times v. Sullivan, 376 U.S. 254, 283 (1964). While this Court may on occasion redefine the scope of that privilege, there is no federal constitutional right of "reputation," such as Petitioner asserts here, that is abridged by application of the First Amendment privilege. Were it otherwise, every libel claim could be brought in federal court, regardless of diversity of citizenship, under federal question jurisdiction and every unsuccessful libel plaintiff could claim an appealable federal issue.

In essence, Petitioner's "due process" claim amounts to nothing more than a complaint that the courts below failed to rule in his favor. Petitioner has no more constitutional standing than any other disappointed litigant who has lost some interest, be it in the nature of reputation or property or some other tangible or intangible interest, as a result of an unfavorable decision. Petitioner's "due process" claim invites wholesale review by this Court of a state court's application of state law and, as such, should be rejected.

Quite apart from the "due process" claim's total lack of merit, there are procedural deficiencies which prohibit review. As the Petition, void of any references to the record, makes clear, this issue was never raised at any stage of the proceeding below, and certainly

none of the state courts considered this "due process" claim.

This Court does not review a federal constitutional issue when, as here, that issue was neither raised in nor passed upon by the highest state court.

It is a well established principle of this Court that before we will review a decision of a state court it must affirmatively appear from the record that the federal question was presented to the highest court of the State having jurisdiction and that its decision of the federal question was necessary to its determination of the cause."

Durley v. Mayo, 351 U.S. 277, 281 (1956) (quoting Williams v. Kaiser, 323 U.S. at 477). See also Street v. State of New York, 394 U.S. 576, 581 (1969) (Supreme Court may not review a constitutional issue if it was not presented to the state court "in such a manner that it was necessarily decided" by the state's

highest court); Cardinale v. State of Louisiana, 394 U.S. 437, 438

(1969) (although certiorari was granted to consider constitutional question, it later emerged that question had never been raised, preserved or passed upon in state courts; writ dismissed for want of jurisdiction). See also Supreme Court Rule 21.1(h).

CONCLUSION

The petition for writ of certiorari presents no issue warranting review, or properly reviewable, by this Court, and should be denied.

Dated: New York, New York
April 9, 1990

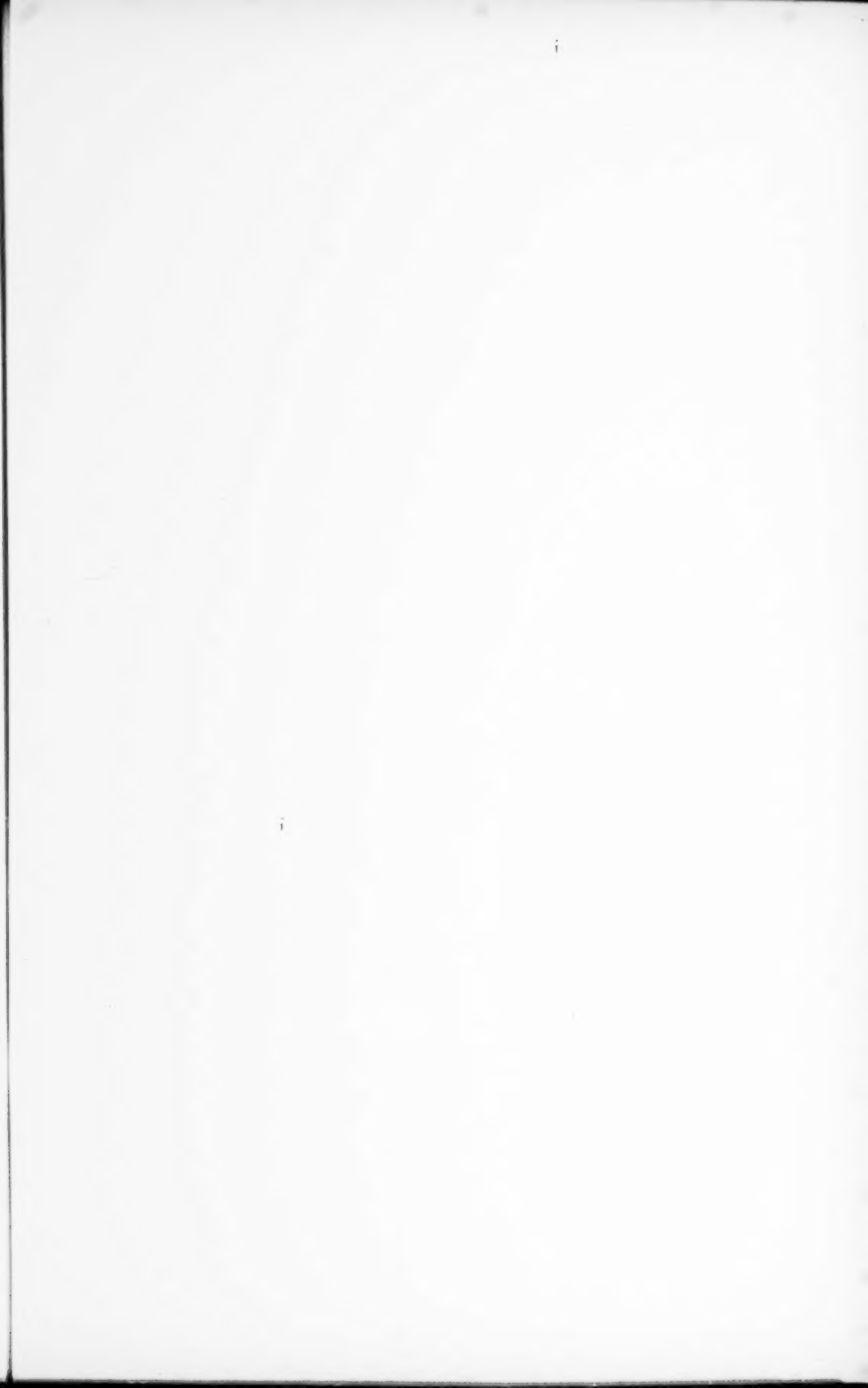
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No. 89-1420

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APR 20 1990

JOSEPH F. SAPIROL, JR.
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

HERMAN WEINER,

Petitioner,

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DOUBLEDAY & COMPANY, INC.

and

SHANA ALEXANDER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT
OF APPEALS, STATE OF NEW YORK

REPLY BRIEF FOR PETITIONER

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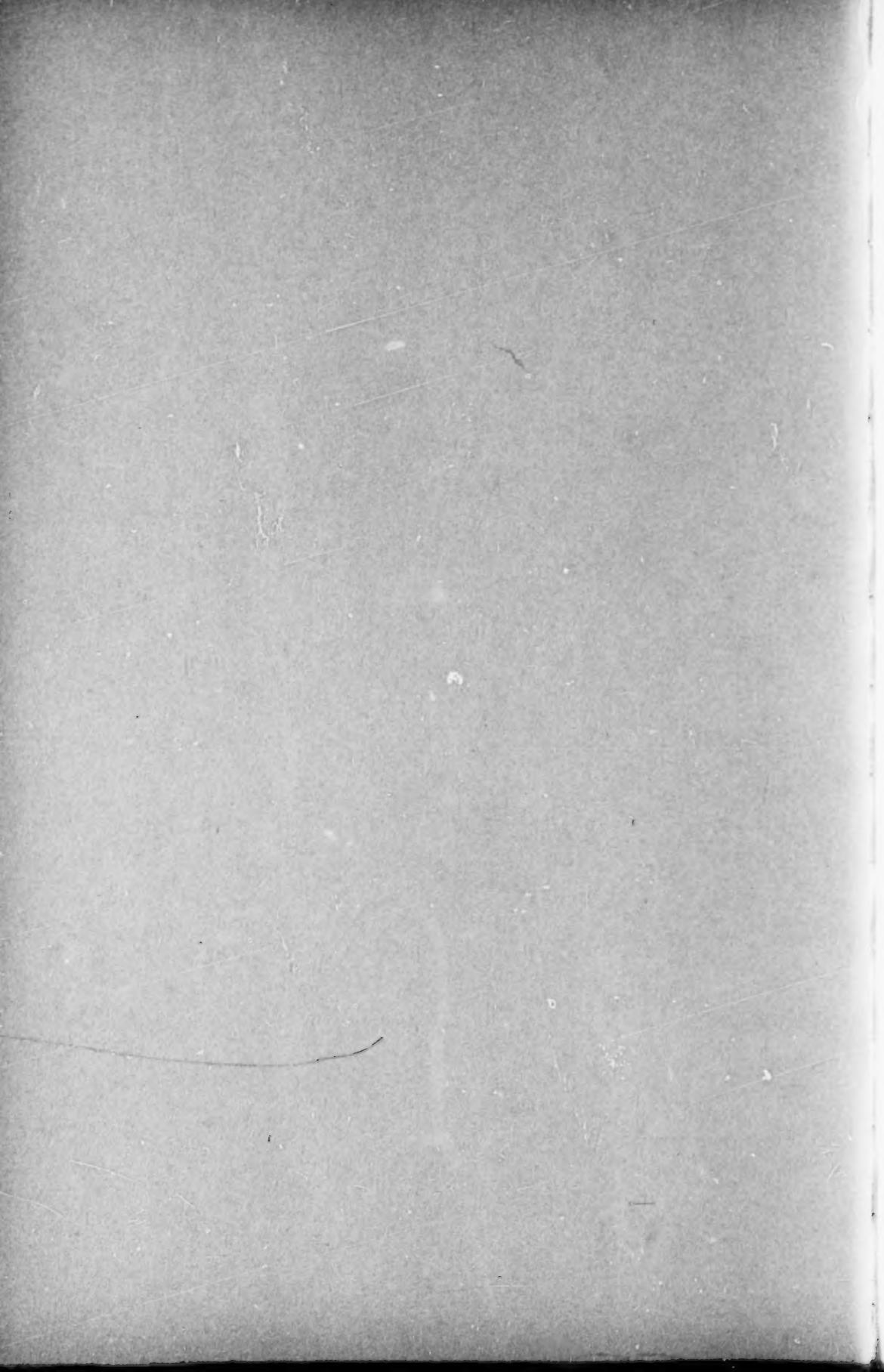


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In The
Supreme Court of the United States
October Term, 1989

No. 89-1420

HERMAN WEINER,

Petitioner,

v.

DOUBLEDAY & COMPANY INC.

AND

SHANA ALEXANDER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF THE STATE OF NEW YORK

REPLY BRIEF FOR PETITIONER

REASONS FOR GRANTING THE PETITION

I.

THE NEW YORK COURT OF APPEALS' DECISION RESTED ON THE MISINTERPRETATION AND MISAPPLICATION OF FEDERAL LAW GROUNDS ONLY, THAT OF LEGITIMATE PUBLIC CONCERN WHICH ERRONEOUSLY TRIGGERED A STATE FAULT STANDARD MORE ONEROUS THAN ORDINARY NEGLIGENCE, THEREBY CONFLICTING WITH DECISIONS OF THIS COURT ON FEDERAL QUESTIONS OF FIRST AMENDMENT IMPORT.

Legitimate Public Concern is the Federal standard adopted by the New York Court of Appeals in Chapadeau v. Utica Observer-Dispatch Inc., 38 N.Y.2d 196, 379 N.Y.S. 2d 61, 341 N.E.2d 569 (1975) after a cogent historical analysis of this Court's holdings in Rosenbloom v. Metromedia, 403 U.S. 29 91 S.Ct. 1811 (1971), Gertz v. Robert Welch Inc., 418 U.S. 323 (1974), and about ten other Supreme Court cases from New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 710 (1964) onward to Gertz, supra.

The Brief in Opposition repeatedly tends to misstate petitioner's clear stance, as elaborated upon in his main brief, that it is this constitutional standard of Legitimate Public Concern which, petitioner avers, has been unwarrantedly extended beyond the holdings of this Court during the last twenty years, not the fault standard of gross irresponsibility or gross negligence and its application to the facts of the case, a standard of fault permitted to be chosen by the states under the holding of Gertz, supra, wherein the states could choose a standard of fault, less than malice but higher than strict liability, whenever state libel actions interdicted Federal law holdings under First Amendment protection of speech of Legitimate Public Concern.

As was stated in Rosenbloom, supra:

It is clear that there has emerged from our cases decided since the New York Times the concept that the First Amendment's impact upon state libel laws derive not so much from whether the plaintiff is a "public official," "public figure" or "private individual" as it derives from the question whether the allegedly defamatory publications concerns a matter of public or general interest ... in that circumstance we think the time has come forthrightly to announce that the determination whether the First Amendment applies to state libel action is whether the utterance involved concerns an issue of public or general concern, albeit leaving the delineation of the reach of that term to future cases (emphasis ours).

Chapadeau, supra, the leading Court of Appeals case cited in its decision in the case at bar adopted the Rosenbloom holding of the constitutional mandate of Legitimate Public Concern together with a fault standard of malice, for a period of about three years when Gertz, a private figure case, as in Rosenbloom, gave permission to the states in private figure cases to choose a fault standard as indicated above.

Private figure cases continue to follow Federal law rulings in all respects as is clearly set forth in Chapadeau.

There is no case decided by the New York Court of appeals in which any independent, adequate state law has been declared or implemented which is in any way dissociated from the First Amendment constitution mandate of Federal law.

At two points in its decision in the case at bar, the Court of Appeals cites its leading case, Chapadeau, supra:

Alternatively, defendants argue that the statement concerns a subject "reasonably related to matters warranting public exposition" (Chapadeau, 38 N.Y.2d at 199, supra, A6.

and again at A14:

In Chapadeau we held that where the content of the article is arguably within the sphere of legitimate public concern, which is reasonably related to matters warranting public exposition, the defamed party must establish "that the publisher acted in a grossly irresponsible manner...."

It is clear that the Chapadeau guidelines following and incorporating Rosenbloom and Gertz are the federally mandated standards and have been since 1975.

To state, therefore, that in discussing the implications of Gaeta v. New York News Inc., 62 N.Y.2d 340, 477 N.Y.S.2d 82 (1984), the Court of Appeals cited only state law as authority is clearly inaccurate.

Petitioner, as appellant in the Court of Appeals, did not concede that Nutcracker, a "quasi" true-crime story, was a matter of Legitimate Public Concern, but that even if it were so, arguably, the gratuitous adverting to appellant Herman Weiner was not encompassed within that definition by way of the defamatory three sentences discussed in petitioner's main brief; that the statements about petitioner were not part of any inquiry or investigation of the treatment by the

dozen or so psychotherapists who attempted to help the main protagonist, Frances, and that the murder of his grandfather by Frances' son, ten to fifteen years after he began to treat Frances, when her children were two and three years of age, was not a matter of public issue or concern as understood by this Court.

In Gaeta, supra, however, the court of Appeals did not set a new independent and adequate state standard dissociated from the Court's abiding efforts to balance the evolving equities between the First Amendment and private and public reputations. The Gaeta case, contrary to the statement in respondents' brief A-24, did not create its own precedent, its own standard.

The one reference to Gaeta in the Court of Appeals decision is at A-15, when in commenting on petitioner's contention that the false defamatory statements about

him was a detour from Legitimate Public Concern into the realm of mere gossip and prurient interest, the Court stated:

This is precisely the sort of line-drawing that, as we have made clear, is best left to the judgment of journalists and editors which we will not second-guess absent clear abuse.

There is a full discussion of this case in petitioner's main brief which confirms, additionally, its confusion between Legitimate Public Concern and what the public is interested in and that it has decided not to attempt to delineate what is and what is not Legitimate Public Concern.

This certainly does not appear to be a new precedent, an independent and adequate state ground.

The federal cases cited by respondent's brief on the issue of independent and adequate state ground clearly appear to support petitioner's contention, the

case of Michigan v. Long, 463 U.S. 1032 being particularly apposite.

II.

PETITIONER WAS DEPRIVED OF HIS DUE PROCESS RIGHTS TO A JURY TRIAL UNDER THE FOURTEENTH AMENDMENT UPON THE FINDING OF THE COURT OF APPEALS OF NEW YORK THAT ALTHOUGH HE WAS DEFAMED IN HIS PROFESSION, HE WAS NOT ENTITLED TO A TRIAL BECAUSE HE HAD FAILED TO PRESENT A GENUINE TRIABLE ISSUE ON GROSS IRRESPONSIBILITY AND THAT, THEREFORE, SUMMARY JUDGMENT WAS GRANTED AGAINST HIM ON THAT GROUND ONLY.

Petitioner is a private practitioner in the field of psychotherapy. He has been practicing his profession in the City of New York for most of his life and is licensed by the State of New York. He has enjoyed an untarnished professional life up until the 1985 publication of the book Nutcracker, wherein he was accused of sexual intimacy with a patient, Frances, in the early 1960's. The book is a "true crime story" of the murder of a grand-

veracity of the defamers and their acknowledged prejudice and hostility.

3. The Court of Appeals assumed that the defamers were in a position to know the truth, although they specifically stated their "belief," "wonder" and "claim."

The Court of Appeals declined to evaluate independently whether or not the statements about petitioner were matters of Legitimate Public Concern but stated that such a choice of what was in the public interest and concern was a matter for journalists and editors, and that the amount of money devoted to the enterprise (the publication of the book) was some evidence of its "interest to the public," nor would they "second-guess" the press absent "clear abuse."

The book Nutcracker was on the best-seller list throughout the country and in New York City and environs for many

months. While petitioner suffered mental and emotional anguish, and his practice has declined, he cannot as yet assign a specific money loss attributable to the defamation.

Petitioner's contention is that the misinterpretation and misapplication of the Public Interest standard erroneously triggered a higher, more onerous standard of gross irresponsibility for him to prove, nor was there any acknowledgement by the Court of Appeals of indicia of malice, noted by the lower Court, which on a full trial would have enabled him to overcome any media privilege and even allow him to prove constitutional or common law malice, or in any event those elements bypassed in the Court's considerations.

Contrary to the holding in Paul v. Davis, 424 U.S. 693 (1973), petitioner's liberty interest was accompanied by his

impairment of his professional worklife under the Fourteenth Amendment, due to the false defamation per se.

CONCLUSION

The petition for a writ of certiorari presents substantial issues warranting review, properly reviewable by this Court and should be granted.

Dated: New York, New York
April 16, 1990

Respectfully submitted,

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FOR PETITIONER

ON THE BRIEF:

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father by his grandson, the son of his patient, in 1978, about ten years after he ceased treatment of Frances, who had been treated since childhood by many therapists before and after petitioner. When he treated Frances, her children were two and three years of age.

Documentary proofs in the record reveal that the following findings were not considered by the Court of Appeals, who did not grant summary judgment against him on what a jury would conclude:

1. That the Supreme Court of New York in granting summary judgment to him on liability found the following:

- a. that there was evidence of distortion by the author who, in transcribing her written notes to the printed version in the book, made the accusations seem more factual and reasonable;

b. that the author claimed to believe in the truth of the accusation although there were no factual grounds for the conclusory factual assertions;

c. that on petitioner's motion for summary judgment there were no affidavits from any one of the three persons who uttered the libelous speculations;

d. that petitioner's affidavit of innocence in the matter was uncontradicted by any affidavit asserting any fact by any libeler;

e. that there was no evidence or fact presented in corroboration of the defamation in respondent's motion for summary judgment; and

f. there was no evidence of any substantiation of investigation for the defamatory statements.

2. The Court of Appeals did not take note of the blatant unreliability for